FILED
SEP 17 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

No. 405

OCTOBER TERM, 1955.

GRIMES & HAUER, INC.,
Petitioner,

vs.

SAM POLLACK,
Individually and as International Representative of Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. L., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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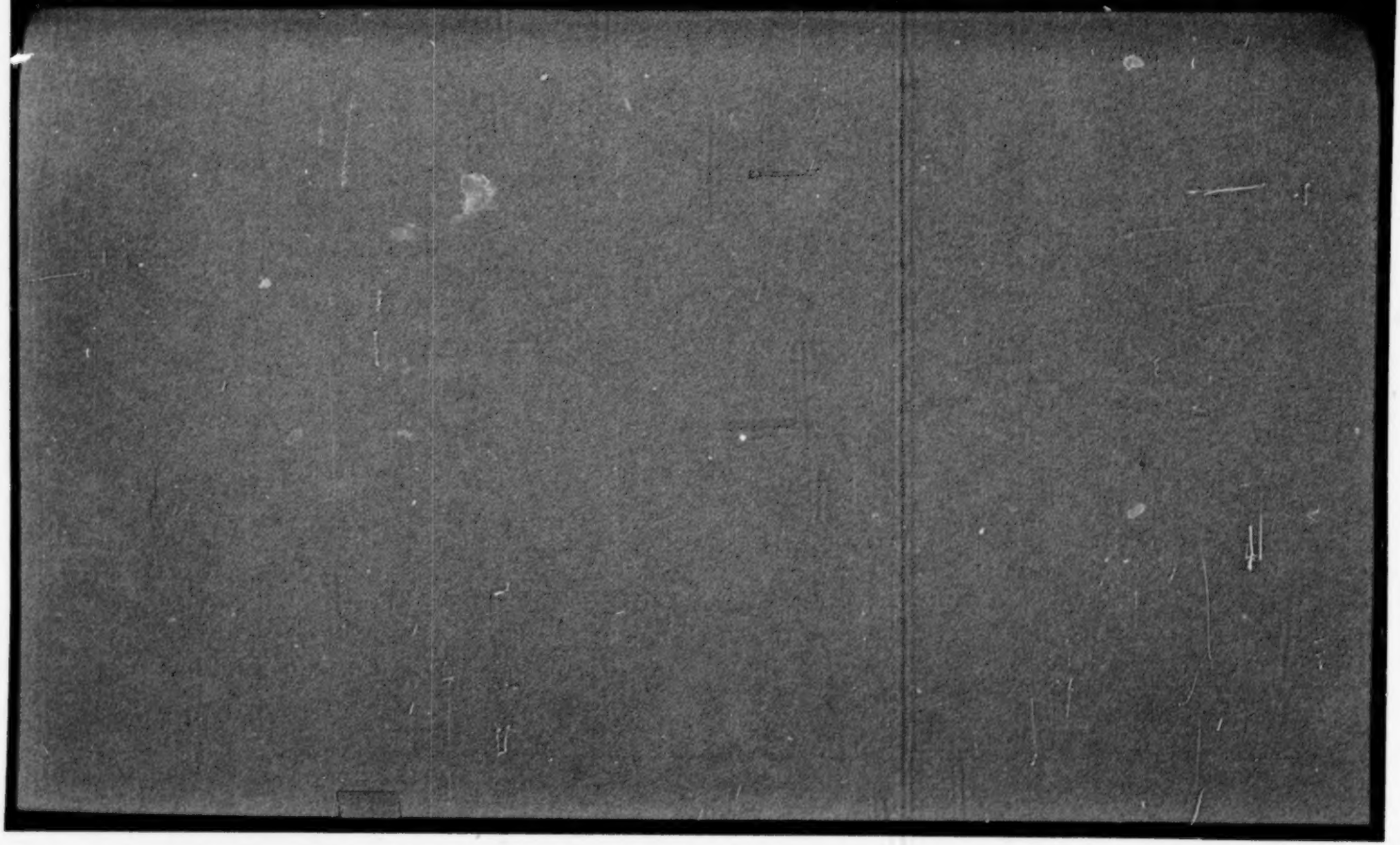

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SAM POLLACK,
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of Amalgamated Meat Cutters and Butcher
Workmen of North America, A. F. L., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Grimes & Hauer, Inc. respectfully petitions for a writ of certiorari to review a judgment of the Ohio Supreme Court.

OPINIONS BELOW.

The opinion of the trial court is reported at 115 N. E. (2d) 59, and 51 Ohio Opinions 142 (March 23, 1953). (A copy is set forth as Appendix A, at page 1a.) The Court of Appeals rendered two opinions; its first is reported at 115 N. E. (2d) 468 (Nov. 24, 1953). (A copy is set forth as Appendix B, at page 7a.) Its second opinion is reported at 119 N. E. (2d) 889, and 54 Ohio Opinions 433 (July 12, 1954). (A copy is set forth as Appendix C, at page 9a.)

The opinion of the Ohio Supreme Court is reported at 163 Ohio State 372, and 56 Ohio Opinions 341 (May

25, 1955). Two Judges dissented. No dissenting opinion was filed. (A copy of the opinion is set forth as Appendix D, at page 15a.)

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. C. Sec. 1257(3), which permits review by certiorari of a case involving the construction of a federal statute: *Murray v. Joe Gerrick & Company*, 291 U. S. 315, 316 (1934); *Frost & Company v. Coeur D'Alene Mines Corp.*, 312 U. S. 38, 40 (1941).

The federal statute involved is the Labor-Management Relations Act, 1947 (29 U. S. C. Sec. 151 *et seq.*).*

The Ohio Supreme Court, the highest Court of the State of Ohio in which a decision could be had, affirmed the judgment of its Court of Appeals which had reversed a judgment and decree of the Trial Court granting the Petitioner** a permanent injunction against the picketing of Respondents.** The Ohio Supreme Court affirmed that judgment for the sole reason, as stated by it, that peaceful picketing of the business of an employer engaged in interstate commerce for the purpose of organizing such employer's non-union employees

> "* * * relates to unfair labor practices; *and the employer must, initially at least, pursue the remedy of presenting his grievance to the National Labor Relations Board.*" †
>
> (Syllabus, Advance Sheets, 163 Ohio State 372.)

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* This statute will hereinafter be termed the Act.

** The Petitioner will hereinafter be termed the Employer, and the Respondents, the Union.

† All emphasis herein is supplied.

The order granting the injunctive relief was reversed by the Court of Appeals solely by reason of its construction of the Act, holding that jurisdiction over the subject matter of the instant action was vested exclusively in the National Labor Relations Board.*

The judgment of the Ohio Supreme Court was rendered May 25, 1955. Application for rehearing, timely filed, was denied June 29, 1955.

QUESTIONS PRESENTED.

Each of the questions stated below assumes that, as here, a union is engaged in peacefully picketing the places of business of an employer engaged in interstate commerce, and that, as here, the union represents none of its employees, and makes no claim that its picketing is protected by the Act.

1. When, as here, an employer contends that a union's picketing does not violate the Act and that the Labor Board would not exercise its jurisdiction if it were invoked, must a state court decline jurisdiction until the employer "initially" presents its grievance to the Labor Board, or does a state court have jurisdiction to determine "initially, at least" (a) whether the union's conduct reasonably constitutes an unfair labor practice under the Act and (b) whether a state remedy would conflict with a federal remedy?

2. When, as here, a union claims that its picketing does not violate the Act, but also pleads that the employer's sole relief is with the Labor Board, does a state court have jurisdiction to determine whether this plea is a defense?

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* The National Labor Relations Board will hereinafter be termed the Labor Board.

3. When, as here, a union engages in conduct constituting a secondary boycott under state law, does a state court have jurisdiction to determine whether such conduct reasonably constitutes an unfair labor practice under the Act, and if, as here, it does not, then to supply a state remedy therefor?

4. When, as here, state law provides a remedy for interference with the performance of individual employment contracts, does a state court have jurisdiction "initially at least" to determine (a) whether the Act provides a remedy for picketing calculated to interfere with the performance of such contracts; (b) whether the state remedy protecting the performance of such contracts conflicts with any federal remedy, and (c) if, as here, there is no such conflict of remedies, then to supply the state remedy therefor?

5. Are both public and private rights "comprehended in the * * * Act," as was held by the Ohio Supreme Court, so that state courts are deprived of jurisdiction to enforce private rights under state law, even though there is no conflict with a remedy under the Act?

6. In view of the provisions of Section 14(b) of the Act, does a state court have jurisdiction to enforce the state law relating to coercion of an employer to execute an employment agreement requiring membership in a union as a condition of continued employment?

7. Does the phrase "state law" contained in Section 14(b) of the Act, as held herein by the Ohio Supreme Court, exclude law established by state courts of last resort and is its application confined to state constitutional provisions and state statutes where the forbiddance as to compulsory union membership is wider than the forbiddance established by *Crosby v. Rath, infra*?

STATUTES INVOLVED.

Labor Management Relations Act, 1947 (Act of June 23, 1947, 61 Stat. 136).

Section 8(a) "It shall be an unfair labor practice for an employer * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *" (29 U. S. C. Sec. 158(a)(3).)

Section 8(b) "It shall be an unfair labor practice for a labor organization or its agents * * *

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *" (29 U. S. C. Sec. 158(b)(2).)

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 * * *" (29 U. S. C. Sec. 158(b)(4)(A)(B).)

Section 14(b) "Nothing in this Act shall be construed as authorizing the execution or application of agree-

ments requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." (29 U. S. C. Sec. 164(b).)

Section 301(a) "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (29 U. S. C. Sec. 185(a).)

STATEMENT OF THE CASE.

The Employer is engaged in commerce in the processing and sale at retail of cut-up poultry (R. 24). Its business here involved is the operation of an office, warehouse and seven retail sales places, all in the metropolitan area of Cleveland, Ohio (R. 55). Five of the sales places are concessions leased to it by the S. S. Kresge Company. None of its Cleveland employees were members of the Union or desired to be represented by it (R. 27-30, 169).

The Union consists of officers and members of Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 427, A. F. L. (R. 105).

None of its employees engaged in a strike against the Employer. Each worked under an individual written contract of employment with the Employer, covering terms and conditions of employment. The trial court found these contracts to be in the form held to be valid in *Crosby v. Rath*, 136 Ohio State 352 (1939), certiorari twice denied, 312 U. S. 690 (1941) and 316 U. S. 688 (1942).* Each contract was for a 3-month period and provided for

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* This decision will hereinafter be termed *Crosby*.

automatic renewals in the absence of notice (R. 36, Pltf.'s Ex. 2, R. 173-175).

The Union's Demand.

On his request, an officer of the Union met with officers of the Employer. There the Union officer showed the Employer's officers a form of contract, which he claimed was uniformly signed by other employers and which he requested them to sign (R. 26, 27).

It contained a clause requiring all of the Employer's employees, as a condition of continued employment, to become members of the Union within 30 days following its execution (Pltf.'s Ex. 3, Def. Ex. B, R. 176-177).

The Employer's officers refused to sign the contract unless its employees approved of it (R. 29).

Later the Union officer wrote the Employer, urging it to sign the contract (Pltf.'s Ex. 1, R. 29, 172). Receiving no reply, the Union commenced and continued picketing of the Employer's Cleveland places of business until, following final hearing, it was enjoined by the Trial Court (R. 31). The Union continued picketing, although served with notice of Employer's contracts with its employees (R. 51-52).

There was no dispute as to wages, the Union stipulating that it did not claim that the wages paid by Employer were lower than those provided in its proposed contract (R. 129).

The Union's Secondary Boycott Was Not of the Type Forbidden by the Act.

Following picketing of one of the five Kresge stores, Union officers called upon the manager of another Kresge store, not theretofore picketed. They said they hoped to confine the picketing to stores other than the store of this

manager. The manager replied that if any trouble did develop at his store, he would be inclined to close Employer's concession in his store (R. 99). Thereafter when the Union extended the picketing to this second store, a Union officer asked this manager if then there had been "any change." The manager replied that his "position was just the same" (R. 100).

All members of the Union employed in other concessions in these stores continued to work during the picketing. The Union did not attempt to induce the employees of any employer to strike or to halt deliveries (R. 110, 151, 157). There was no evidence of the only type of secondary boycott forbidden by the Act, namely that in Sec. 8(b)(4).

The Employer's Petition.

Employer's petition for injunction in the Court of Common Pleas of Cuyahoga County, Ohio, alleged:

That the Union was picketing in order to coerce the Employer to in turn coerce its employees to become members of the Union or to compel the Employer to discharge those refusing to become members and employ union members. That the Union had demanded that the Employer enter into a contract with it requiring union membership as a condition of employment.

That the Employer had not attempted to influence its employees to join or refrain from joining the Union and none were members.

That each employee had entered into an individual contract with it for fixed periods and although notified of these contracts, the Union continued its picketing, tending to coerce their breach and, as stated above, that other conduct of the Union constituted a secondary boycott.

And that all of this conduct was unlawful under the common law and Constitution of Ohio (R. 1-10).

The Union's Answer.

The Union's answer denied that it had committed the conduct charged but claimed that such conduct violated the Act and claimed, therefore, that exclusive jurisdiction over the subject matter of the petition was vested in the Labor Board (R. 11-16).

The Employer's Reply.

The Employer replied that the Union's conduct was not violative of the Act and it sought no relief thereunder (R. 16-19).

During the hearing, the Union moved to dismiss the petition by reason of its claim that the Labor Board had exclusive jurisdiction. This was overruled and exception taken (R. 101, 102, 171).

The Opinion of the Trial Court.

Following the hearing, the Court issued a permanent injunction. It found it unnecessary to consider the interference with the performance of the individual employment contracts, holding that other conduct charged by the petition and established by the evidence was unlawful under the leading applicable decision of Ohio, viz., *Crosby, supra*. In accordance with that decision, it found the Union's purpose was to unlawfully require Employer's cooperation in organizing its employees.

It cited the following decisions of this Court, namely, *Local 309 v. Hanke*, 339 U. S. 460 (1950); *Building Service Union v. Gazzam*, 339 U. S. 532 (1950), and *Local No. 10 v. Graham*, 345 U. S. 192 (1953) which support the jurisdiction of the Trial Court. (A copy of the judgment is set forth as Appendix E, at page 24a.)

The Two Opinions of the Court of Appeals.

On appeal, the Union claimed Ohio Courts were without jurisdiction of the subject matter.

The Court of Appeals at first affirmed the judgment (a copy of its judgment is set forth as Appendix F, at page 25a) holding that the Union's conduct was violative of Ohio law and that Ohio Courts had jurisdiction of the action. It found as follows:

> "It is conceded that the picketing was for organizational purposes, there being no solicitation of plaintiff's employees to become members of the union. Instead there was tendered to plaintiff a proposed bargaining contract between plaintiff and defendants, by the terms of which plaintiff's employees would be compelled to become members of the local union as a condition of their continued employment. Upon plaintiff's failure to sign the proposed contract, defendants proceeded to picket and banner." (Appendix B, pages 7a-8a.)

Following a rehearing, limited to the effect of *Garner v. Teamsters*, 346 U. S. 485 (1953)* upon the case, the Court of Appeals reversed its judgment, holding that the Labor Board had exclusive jurisdiction of the action. (A copy of that judgment is set forth as Appendix G, at page 26a.)

Although conceding that the Union's picketing "would lead to the interference of the mentioned contracts" of employment, the Court of Appeals held that such result was only "incidental" to the violation of public rights under the Act.

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* This decision will hereinafter be termed *Garner*.

The Opinion of the Ohio Supreme Court.

Upon Employer's appeal, the Ohio Supreme Court did not reverse the holdings of the lower courts as to the illegality of the Union's conduct under Ohio law. (A copy of its judgment is set forth as Appendix H, at page 27a.) Its only syllabus reads as follows:

> "Because of the decision of the Supreme Court of the United States in the case of *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U. S. 485, where a labor union is in dispute with an employer engaged in interstate commerce over the unionization of the employer's nonunion employees, and the union pickets the business locations of such employer in an orderly and peaceful manner, a state court is without jurisdiction to enjoin the picketing; a controversy of this kind comes within the provisions of the Labor Management Relations Act (Section 151 et seq., Title 29, U. S. Code), as it relates to unfair labor practices; and the employer must, *initially at least*, pursue the remedy of presenting his grievance to the National Labor Relations Board."

Under the rules of the Ohio Supreme Court, the syllabus of its opinion states the law of the case.[1]

Its opinion concludes as follows:

> *"In the event this controversy should ultimately be taken before the National Labor Relations Board and that agency should decline to entertain the matter, another question might arise with which we have no present concern."*

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[1] The syllabus of an opinion by the Ohio Supreme Court is prepared by a judge and concurred in by the judges who concur in the judgment. (Rule VI, Rules of Practice of the Ohio Supreme Court.) It states the law of the case. 91 Ohio State 264 (1915); 103 Ohio State 221 (1921); 123 Ohio State 336 (1931).

Its opinion further holds as follows:

(a) That in *Garner* this Court passed on a set of facts resembling those in the instant case;

(b) that the public policy of Ohio established by the Ohio Supreme Court in Crosby did not come within Section 14(b) because the words "state law" refer only to "constitutional provisions or a legislative enactment"; and because Section 14(b) approved only wider state prohibitions than those established by *Crosby*;

(c) without discussion it denied relief from the Union's secondary boycott;

(d) it denied protection of the performance of the employment contracts, arguing that *Garner* held that private rights, as well as public rights, are "comprehended" in the Act;

(e) *it finds no specific section of the Act to have been violated.*

There Was Not Presented to Any of the Courts Below the Question as to Lawfulness Under Ohio Law of a Contract Requiring Union Membership When Approved by an Employer and Its Employees.

Here both the Employer and its employees disapproved of such a requirement.

SPECIFICATION OF ERRORS TO BE URGED.

The Employer submits that the Ohio Supreme Court erred in each of the following respects:

1. In holding that an Ohio Court has no jurisdiction "initially at least" to determine its jurisdiction;

2. In holding that the Employer here was required to "initially" apply to the Labor Board for relief against the Union's picketing;

3. In holding that an Ohio Court must await exercising its jurisdiction unless and until the Labor Board has decided that the Board does not have jurisdiction;

4. In holding that an Ohio Court was without jurisdiction here without first finding that there was a reasonable possibility of a conflict between a State and federal remedy;

5. In failing to find that the Union's conduct here did not reasonably constitute an unfair labor practice under the Act;

6. In failing to find that the Union's conduct was not such as is protected by the Act;

7. In failing to find that the Union's plea of federal jurisdiction did not reasonably constitute a defense to this action;

8. In failing to grant relief from the Union's secondary boycott;

9. In failing to grant relief from the Union's picketing, calculated to induce breach of the Employer's contracts of employment;

10. In failing to grant relief from the Union's conduct violative of the Employer's constitutional rights; and

11. In failing to find that an Ohio Court had jurisdiction herein by reason of Section 14(b) of the Act.

REASONS FOR GRANTING THE WRIT.

POINT ONE.

THE OHIO SUPREME COURT, RELYING UPON GARNER, ERRED IN HOLDING THAT OHIO COURTS WERE WITHOUT JURISDICTION HERE BECAUSE EMPLOYER DID NOT "INITIALLY" APPLY TO THE LABOR BOARD FOR RELIEF.

The Decision of This Question by the Ohio Supreme Court Is Not in Accordance With Applicable Decisions of This Court.

A. Garner Is Distinguishable from the Instant Case Both as to Facts and Applicable Law.

(1) *The Facts in the Two Cases Were Dissimilar in Important Particulars.*

Here the Union demanded that Employer execute a contract requiring its employees to become union members as a condition of continued employment, although *none* were members and none had even been solicited to become members (R. 26, 27, 29, 169). In *Garner* the union made no demands either before or during its picketing.

Here all employees were working under individual written employment contracts made with the Employer for definite and unexpired periods (R. 51-54). In *Garner* the employees did not work under employment contracts.

Here the Union engaged in a secondary boycott, unlawful under Ohio law, by exerting pressure on Employer's landlord, but did not seek to induce a work stoppage of any employees which alone is forbidden by the Act. In *Garner* there was no such secondary boycott.

(2) *The Law Applicable in Garner Was Dissimilar to the Law Applicable Here.*

Here, Employer asserted rights under Ohio law prohibiting the coercive compulsion by the Union of Employer's execution of a contract requiring union membership as a condition of continued employment. In *Garner* no such question arose.

Here, Employer asserted the Union's violation of Article I, Section 1, of the Ohio Constitution. However, in *Garner* no question arose under the Constitution of Pennsylvania.

Here, Employer sought protection of its private rights in the performance of its employment contracts, a matter not covered by the Act. In *Garner*, the employer's claimed private rights were identical with public rights protected by the Act with a resultant conflict of remedy. Here, there could be no such conflict.

Further, this Court's decision in *Garner* contains the following limitation:

> "* * * *Nor is there any suggestion that respondent's plea of federal jurisdiction and pre-emption was frivolous and dilatory, or that the federal Board would decline to exercise its powers once its jurisdiction was invoked.*" (346 U. S. 485 at page 488.)

There is here much more than a suggestion that, as hereinafter shown, the Labor Board would decline to exercise its powers.

B. The Ohio Supreme Court Erred in Finding That Ohio Courts Are Without Jurisdiction to Initially Determine Their Jurisdiction in Cases Involving Organizational Picketing of Employers Engaged in Interstate Commerce.

In *Weber v. Anheuser-Busch*, unlike the instant case, the employer's petition alleged that the union's conduct violated Section 8(b)(4)(A) and (B) of the Act. Even

there this Court did not require state courts to initially decline jurisdiction. This Court held:

> "But where the moving party itself alleges unfair labor practices, *where the facts reasonably bring the controversy within the sections prohibiting these practices*, and where the conduct, *if not prohibited by the Federal Act, may be reasonably deemed to come within the protection afforded by that Act*, the state court must decline jurisdiction * * *."
>
> *Weber v. Anheuser-Busch*, 348 U. S. 468, 99 L. Ed. (Advance page 386 at page 394) (1955).

A fortiori, here, the Ohio Supreme Court had jurisdiction to determine whether the facts "reasonably" showed any violation of the Act. However, it made no such finding. Instead it held that such an employer must "initially" apply to the Labor Board for relief.

Nothing in *Garner* or the *Anheuser-Busch* decision establishes that a state court is without jurisdiction to determine its jurisdiction in such case.

C. With Subsequent Approval of This Court, Several State Courts Have Determined Their Jurisdiction in Labor Cases Without Requiring an Employer, Although Engaged in Interstate Commerce, to First Seek Relief from the Labor Board.

1. Wisconsin courts enjoined unlawful means in the conduct of a labor dispute. This Court held that such conduct was neither prohibited nor protected by the Wagner Act. *Allen-Bradley Local v. WERB*, 315 U. S. 740 (1942).

2. Wisconsin courts enjoined recurrent unannounced work stoppages. Such conduct was held to be neither protected nor prohibited by the Act. *International Union, UAW v. WERB*, 336 U. S. 245 (1949).

3. The Washington Supreme Court ordered a union to reinstate and to restore his property rights to a former member wrongfully expelled. It held that such union conduct was not prohibited by the Act. *Mahoney v. Sailors Union of the Pacific*, 145 Wash. Dec. 422, 275 P. (2d) 440, certiorari denied 349 U. S. 915. (April 25, 1955.)

In none of these cases was the plaintiff required to "initially" apply to the Labor Board for relief.[2]

D. The Ohio Supreme Court Did Not Find that There Would Be a Conflict Here Between the State Remedy and the Federal Remedy if Ohio Courts Assumed Jurisdiction.

In *Garner* this Court held that a Pennsylvania Court could not exercise jurisdiction because of a resulting conflict in applying a remedy. There the employer conceded that it could have obtained relief from the Labor Board.[3] In a later opinion this Court stated as to Garner:

> "In *Garner* the emphasis was * * * *on two similar remedies*, one state and one federal, *brought to bear on precisely the same conduct*."
>
> *Weber v. Anheuser-Busch*, 348 U. S. 468, 99 L. Ed. (Advance p. 386 at p. 393) (1955).

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[2] Also the following state courts have held that they had jurisdiction to enjoin picketing after finding that the union's conduct was neither prohibited nor protected by the Act: *Milwaukee Boston Store Co. v. Amer. Fed. of Hosiery Workers*, ------ Wis. ------, 69 N. W. 2d 762 (1955) (urging the public not to buy certain products); *Goodwin's Inc. v. Hagedorn*, 303 N. Y. 300 (1951) (picketing for recognition). In neither was a plaintiff required to "initially" apply to the Labor Board for relief.

[3] The employer's brief in *Garner* contained the following statement:

"* * * The decision of the Supreme Court of Pennsylvania that Section 8(b)(2) does apply to this picketing * * * is sustained by * * * the decisions of the National Labor Relations Board. * * *" (U. S. Supreme Court, October Term 1953, No. 56, pages 84 and 85.)

Here, the Ohio Supreme Court found no conflict of remedies for the following conduct not in *Garner*:

(a) Interference with the performance of the individual contracts of employment;

(b) Secondary boycott violative of Ohio law alone;

(c) Protection of its rights arising under the Ohio Constitution.

The Act provides no remedy for any such conduct.

POINT TWO.

THE FACTS HERE DID NOT REASONABLY SHOW THAT THE UNION'S CONDUCT WAS VIOLATIVE OF THE ACT. NOR DID THE OHIO SUPREME COURT FIND THE UNION'S CONDUCT TO HAVE VIOLATED THE ACT.

The Following Issues Presented Hereunder Have Not Been Previously Decided by This Court.

A rule results from the decision in *Weber v. Anheuser-Busch, supra,* that state courts retain jurisdiction in the absence of a reasonable showing of a violation of the Act.

Only three sections of the Act need be discussed.

A. The Facts Did Not Reasonably Show That the Union's Conduct Violated Section 8(b)(1) of the Act.

Although contested, the Ohio Supreme Court made no decision as to applicability herein of Section 8(b)(1) of the Act. The Labor Board has held that Section 8(b)(1) of the Act applies only to violence or threats of violence to employees, or to threats made to employees of loss of their employment or to other similar conduct. *Miami Copper Co.*, 92 NLRB 322 (1950). No such conduct is here involved.

Section 8(b)(1) of the Act governs only *means* of conducting labor disputes, not purposes of conduct. *Perry Norvell*, 80 NLRB 225 (1948).

The Labor Board has held that picketing to compel an employer to execute a compulsory membership contract does not violate Section 8(b)(1) of the Act. *National Maritime Union of America*, 78 NLRB 971 (1948).[4]

The Labor Board has held that peaceful picketing of an employer is not violative of Section 8(b)(1), even though, as here, none of its employees were members of the picketing union. *Local 74 United Brotherhood of Carpenters and Joiners* (Watson's Specialty Store), 80 NLRB 533 (1948).

General Counsel of the Labor Board has repeatedly refused to issue complaints sought as violative of Section 8(b)(1), when based, as here, upon peaceful picketing for organizational purposes.[5]

Thus under the facts here, it could not have been reasonably shown that Section 8(b)(1) had been violated.

B. The Facts Did Not Reasonably Show That the Union's Conduct Violated Section 8(b)(2).

Applicable decisions of the Labor Board show that it could not be reasonably held here that Section 8(b)(2) had been violated. The following decision upon several consolidated cases stands unreversed and is the leading case upon this question.

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[4] The Labor Board adheres to this view: *Amalgamated Meat Cutters & Butcher Workmen*, 81 NLRB 1052 (1949); *American Radio Association*, 82 NLRB 1344 (1949); *United Mine Workers*, 83 NLRB 916 (1949); *Medford Bldg. & Constr. Trades Council* (Kogap Lumber Industries), 96 NLRB 165 (1951).

[5] Administrative Ruling, Case No. 739 (1953), 32 LRRM 1464; Administrative Ruling, Case No. 1069 (1954), CCH, NLRB Decisions, Par. 52,493; *NLRB v. Swift & Co.* (D. C. E. D. Mo., E. Div.), 130 F. Supp. 214 (1955).

In all of the following respects the facts were the same as here:

The unions picketed after the employers refused union demands that they "sign an agreement which included a union-security clause * * *" (at page 1611). There had been only one meeting between the employers and union officers (at page 1595). The unions did not represent a majority of the employees of the employers.[6] There had been no contract negotiations between the unions and the employers.

Still in these consolidated cases the Labor Board found that Section 8(b)(2) had not been violated and refused to grant relief. *United Mine Workers* (M. F. Fetterolf Coal Co.), 103 NLRB 1572 (1953).

However, the Labor Board has found Section 8(b)(2) to have been violated where a union had demanded provisions for a closed shop or other employment conditions which, unlike the instant case, would not grant employees 30 days in which to join a union. *National Maritime Union of America*, 78 NLRB 971 (1948).[7]

Therefore, the Employer here could have obtained no relief from the Labor Board under Section 8(b)(2).

C. The Facts Did Not Reasonably Show That the Union's Picketing Violated Section 8(b)(4) of the Act.

The evidence showed that the Union made no attempt to interfere with the performance of work by employees of Kresge, by any other concessionaire, or by employees mak-

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[6] There a number of employees were coerced by mass picketing and violence to sign union cards (at page 1605).

[7] *Amalgamated Meat Cutters & Butcher Workmen*, 81 NLRB 1052 (1949); *American Radio Association*, 82 NLRB 1344 (1949); *United Mine Workers*, 83 NLRB 916 (1949); *Medford Bldg. & Constr. Trades Council* (Kogap Lumber Industries), 96 NLRB 165 (1951).

ing deliveries (R. 15, 110, 157). Its banners merely stated: "Grimes & Hauer Poultry Does Not Employ Union Help" (R. 113, 114).

However, such a boycott violates Ohio law.

> "*A boycott * * * may be secondary where there is* not merely a concerted refrainment from business relations with the person against whom the boycott is directed or by peaceful means a concerted inducement of others outside the combination to so refrain, but *an exercise of economic pressure upon such others to cause them to refrain from business relations* with the person against whom the boycott is directed, through fear of loss or damage to themselves if they refuse to do so."
>
> *Anderson Sons Co. v. Local Union,* 156 Ohio State 541 (1952), Syllabus 2.

However, the threat of boycott made to the Kresge store manager did not fall within Section 8(b)(4), forbidding a labor organization or its agents to

> "engage in, or to induce or encourage the *employees of* any employer to engage in, a strike or a concerted refusal in the course of their employment * * *" (Page 5.)

The following decision made the same distinction as here made, as between pressure brought upon an *employer* and pressure brought upon *employees* as forbidden by the Act:

> "Petitioner also sees in the union's pressure on neutral *employers* to stop accepting his shipments a violation of the secondary boycott provisions. Section 8(b)(4)(A) * * * We cannot agree that they tended to induce or encourage the employees to engage in a strike or concerted refusal forcing the employer to cease doing business with another. The embargo on Rabouin's goods was *the product solely of requests*

*addressed to management or supervisory personnel * * * The Union thus did not 'encourage the employees.'"*

Rabouin d.b.a. Conway's Express v. NLRB, 195 F. (2d) 906 (CA-2, 1952).

In the following case a union officer in a conversation with an officer of an employer threatened that the latter would be picketed unless he refused to handle products made by another employer. The Labor Board held that Section 8(b)(4) was not violated as the inducement or encouragement there was of an employer, and not of employees, as forbidden in that section. *Printing Specialties & Paper Converters Union* (Sealright Pacific, Ltd.) 82 NLRB 271 (1949).[8]

The Wisconsin Supreme Court recently enjoined picketing constituting a secondary boycott under Wisconsin law. It found that Section 8(b)(4) of the Act had not been violated, stating:

"In the instant case, the picketing by defendants did not exert any pressure upon the employees of the Boston Store to engage in any concerted effort to refuse to do anything with respect to 'Belle-Sharmeer' stockings being sold in the store. The economic pressure exerted by defendant's picketing was directly upon the Boston Store and not indirectly through its employees."

Milwaukee Boston Store Co. v. American Fed. of Hosiery Workers, ____ Wisc. ____, 69 N. W. (2d) 762 (1955).

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[8] The Labor Board and its General Counsel have consistently ruled that inducement of *employers but not of employees* does not violate Section 8(b)(4); *Sheet Metal Workers Intl. Assn.,* 102 NLRB 1660 (1953); *Teamsters Union* (Texas Industries), 112 NLRB No. 111 (1955); and *Administrative Ruling,* Case No. 305 (1952), 30 LRRM 1034.

Therefore, it would seem that the Union's secondary boycott here was of a type which "the National Labor Relations Board is without express power to prevent," and which is, therefore, "governable by the State" as indicated in *Garner*, where this Court stated:

> "In such cases we have declined to find an implied exclusion of State powers." (346 U. S. 485, at page 488.)

This type of secondary boycott was found by the Court of Appeals to violate Ohio law (Appendix C, page 10a), but could not reasonably have been shown to violate the Act.[9]

POINT THREE.

AS THE FACTS HERE SHOW THAT THE EMPLOYER COULD NOT HAVE OBTAINED RELIEF FROM THE LABOR BOARD, IT WOULD HAVE BEEN FUTILE TO APPLY TO IT FOR RELIEF. OHIO COURTS, THEREFORE, RETAINED JURISDICTION TO GRANT RELIEF.

That the futility of obtaining appropriate relief from the Labor Board should be considered as shown in a decision of this Court subsequent to *Garner* and also involving an employer engaged in interstate commerce, as follows:

> "There has been no clear showing that Respondent has applied to the National Labor Relations Board for appropriate relief, *or that it would be futile to do so* * * *"
>
> *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933 (1954).

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[9] Also for another reason the picketing of Kresge's entrances would not have violated Section 8(b)(4) as that location would be held to be the situs of the primary dispute. *NLRB v. Service Trades Chauffeurs*, 191 F. (2d) 65 (CA-2, 1952); *NLRB v. Carpenters Union*, 218 F. (2d) 226 (CA-10, 1954); *NLRB v. General Drivers*, ----- F. (2d) -----, CCH 28 Labor Cases, ¶69,396 (CA-5, 1955).

In another decision this Court stated the following limitations upon its holding in *Garner:*

> "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case recognized that the Act excluded conflicting state procedure to the same end.
>
> * * *
>
> "The care we took in the *Garner Case* to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, *a recognition that if no conflict had existed, the state procedure would have survived.*"
>
> *United Construction Workers v. Laburnum,* 347 U. S. 656, at page 665 (1954).

The decisions of the Labor Board and the administrative rulings of its General Counsel, heretofore cited, show that there was no reasonable probability that the Labor Board would have granted relief. Absent a conflict of remedies here, "the state procedure would have survived."

POINT FOUR.

THE EMPLOYER HERE HAD REMEDIES UNDER OHIO LAW IN AT LEAST THREE FACTUAL SITUATIONS, NONE OF WHICH WERE WITHIN THE ACT.

The Questions Presented Hereunder Were Decided by the Ohio Supreme Court Not in Accordance With Applicable Decisions of This Court.

A. The Act Provides No Remedy to Prevent Interference With Performance of Individual Contracts of Employment. For This There Could Be No Conflict of Remedy as Found in Garner.

The following was stated by that employer in briefs in this Court twice opposing writs of certiorari in *Crosby*:

> "It is good common law in Ohio, as it is elsewhere, that it is illegal to persuade another to break a valid contract for a definite period of time." (No. 187, October Term 1940 and No. 1147, October Term 1941.)

Prior to *Crosby*, the right of protection of performance of employment contracts had been recognized by the Ohio Supreme Court as follows:

> "It would not be legal for a workman, if he had agreed to continue in employment for a year, to break that contract and terminate it without justification after six months. It would, therefore, * * * not be legal for another person to persuade the workman to leave his employment before the year was over, because he would be persuading the workman to do an illegal thing."
>
> *La France v. Electrical Workers*, 108 Ohio State 61, at page 94 (1923).

In the instant case the Court of Appeals held:

> "It cannot be denied that the picketing in this case * * * would lead to the interference of the mentioned con-

tracts, and the subsequent violation of the private rights of the parties involved herein." (Appendix C, page 13a.)

It held such effect to be merely "incidental" to the violation of public rights protected by the Act. The Ohio Supreme Court held that:

"Both public and private rights are comprehended in the Labor-Management Relations Act."

However, the only employment contracts protected by the Act are collective employment contracts. (Section 301(a), page 6, *supra*.)

The Ohio Supreme Court relied solely upon lack of jurisdiction as held in *Garner* in denying relief from interference with the performance of the Employer's contracts with its employees. *Garner* we believe to be inapplicable as to this for the following reasons:

1. In *Garner* this Court held that even if private rights had there been involved, there would result a conflict of remedies, inasmuch as both the Act and Pennsylvania state law created the same rights.

There could be no such conflict here, these contracts not being covered by the Act.

2. In *Garner* this Court relied upon its decision in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907) showing that pre-existing private rights could be abolished by implication by the enactment of federal legislation.

In that case *both* the Interstate Commerce Act and Texas Courts had established rights to obtain reasonable freight rates. The rights as to rates were identical, but there was a conflict in applying a remedy. Here, unlike both *Garner* and *Texas v. Abilene, supra,* Ohio law alone has created a right for the protection of the performance of Employer's contracts while the Act creates no such right or remedy.

B. The Act Provides No Remedy for Conduct Constituting the Type of Secondary Boycott Which Occurred Here.

As shown heretofore, the Union's secondary boycott did not violate Section 8(b)(4), which is limited to the inducing or encouraging of *employees* to strike or engage in work stoppage. The Court of Appeals found this secondary boycott to be unlawful under Ohio law. The Ohio Supreme Court made no ruling, holding only that the Labor Board must "initially" rule upon the question.

Under the rule stated in *Weber v. Anheuser-Busch, supra,* we believe Employer to have been entitled to relief here under Ohio law, as the facts did not reasonably bring such boycott within the Act.

C. The Act Provides No Remedy for Conduct Which the Ohio Supreme Court Had Held to Be Violative of Rights Under the Ohio Constitution in an Unreversed Decision.

The Employer's petition charged that the Union's conduct violated Article I, Section 1, of the Ohio Constitution. In holding the picketing to be unlawful, the Trial Court quoted as follows from the decision of the Ohio Supreme Court in *Crosby:*

> "The right to contract, the right to do business, and the right to labor freely and without restraint are all constitutional rights equally sacred, and the privilege of free speech cannot be used to the exclusion of other constitutional rights." (Appendix A, page 4a.)

The Court of Appeals approved the Trial Court's conclusions that the Union's picketing was "unlawful in purpose and therefore, contrary to the public policy of the State as announced by the Supreme Court of Ohio in the case of *Crosby v. Rath* * * *." (Appendix C, page 10a.)

Such rights had earlier been recognized by the Ohio Supreme Court in *LaFrance v. Electrical Workers, supra,* in which the Ohio Supreme Court stated:

> "The right of workmen to be employed, irrespective of union membership, must be maintained; the right of the employer to conduct his business without illegal interference must be upheld." (Page 95.)

The Ohio Supreme Court does not reverse either of these rulings. The Act does not protect the right of an Employer to conduct his business. Here, no employee asserted a right to enter into a collective contract with Employer.

Obviously there could be no conflict with any remedy under the Act. The decision of the Ohio Supreme Court in *Crosby* established a public policy of Ohio as to industrial relations. The Trial Court correctly stated that *Crosby* "has not been modified, distinguished nor overruled by the Supreme Court since its pronouncement in 1939."

POINT FIVE.

THE OHIO SUPREME COURT ERRED IN ITS CONSTRUCTION OF SECTION 14(b) OF THE ACT.

A. The Words "State Law" Contained in Section 14(b) Include a Policy of a State Established by Its Court of Last Resort.

The Question Presented Hereunder Has Not Been Previously Decided by This Court.

The Employer contends that the public policy of Ohio, established by its Court of last resort, constitutes "state law" under Section 14(b). The Ohio Supreme Court holds here that Section 14(b) applies only to legislative enactments and constitutional provisions of a state. That conclusion is contrary to the legislative history of that Section.

Coincident with the passage of the Act, the House Conference Committee issued a report. Referring to Section 14(b) it states:

"It was never the intention of the National Labor Relations Act, as disclosed by the legislative history of that Act to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism."

This report states that the provisions of Section 8(a)(3) could not

*"be said to authorize arrangements of this sort in States where such arrangements were contrary to State policy * * * The conference agreement, in Section 14* (b), *contains a provision having the same effect."*

Had Congress intended to limit the expression of *State powers and policy* to statutes and constitutions, it would have so stated in this report.[10]

As to the expression "state policy," this Court held, also in a picketing case, as follows:

"The fact that California's *policy* is expressed by the judicial organ of the State rather than by the legislature we have repeatedly ruled to be immaterial * * *"

* * *

"It is not for this Court to deny to a State the right, or even to question the desirability, of fitting its law * * * to its courts * * * It is particularly important to bear this in mind in regard to matters affecting industrial relations which, until recently, have 'been left largely to judicial lawmaking and not to legislation.' "

Hughes v. Superior Court of California, 339 U. S. at pages 466 and 467 (1950).[11]

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[10] House Conference Report 510 on H. R. 3020, 80th Congress, 1st Session, page 60.

[11] The words "powers," "policy" and "state law" include decisions of state courts. *Pennsylvania R. R. Co. v. Hughes,* 191 U. S. 477 (1903); *Nashville v. Browning,* 310 U. S. 362, 369 (1940), and *Building Service Union v. Gazzam,* 339 U. S. 532 (1950).

Ohio has a judicially declared policy prohibiting the coercion under the facts here of employees by their employer to join or not to join a union as a condition of their continued employment. The Union's demands here were in conflict with that policy. *Crosby, supra.*

B. The Ohio Supreme Court Claimed That the Restriction Imposed by *Crosby* Upon Agreements Is Narrower Than Restrictions Authorized by Section 14(b) and, Therefore, That Section 14(b) Is Inapplicable Here.

The Question Presented Hereunder Was Decided by the Ohio Supreme Court Not in Accordance With Applicable Decisions of This Court.

Specifically it held that

> "it can not fairly be said that the Crosby and Anderson" [12] "cases bring Ohio within the exception contained in Section 14(b)."

While not overruling *Crosby*, it held that Section 14(b) applied only where state forbiddance as to compulsory union membership was wider than the forbiddance established by *Crosby*.

Crosby, it also held, was limited to the facts there in issue [13] and did not establish a general prohibition against execution of such agreements.

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[12] As the *Anderson* case involved a secondary boycott, this citation by the Court as to Section 14(b) was inapplicable.

[13] While in the first hearing of *Crosby* there had been an issue of violent conduct, that issue was absent in the second hearing and in the second petition for certiorari, as there had been no violence for two years. *Crosby v. Rath*, 312 U. S. 690 (1941), 316 U. S. 688 (1942).

The demands in Crosby and here were precisely the same. In both cases the unions demanded the execution of contracts requiring union membership as a condition of continued employment. (See *Crosby v. Rath*, U. S. Supreme Court, October Term, 1940, No. 187, Respondent's Brief, page 2.) Neither union represented any employee of either employer. In *Crosby* the Ohio Supreme Court held such demands unlawful, as did the Trial Court and the Court of Appeals here.

In holding Section 14(b) to be here inapplicable, it failed to follow the decision of this Court in *Algoma Plywood & Veneer Co. v. WERB*, 336 U. S. 301 (1949) in which an argument similar to the holding of the Ohio Supreme Court here was rejected.

Further, regardless of the precise language of Section 14(b) the legislative histories of the Act and of the Wagner Act show that Congress intended not to deprive the states of their powers to deal with compulsory union membership.

This Court so held in the *Algoma Plywood* case. There it was argued that Wisconsin could not enforce its policy regarding compulsory union membership. This Court stated the following:

> "* * * The enumeration by the Wagner Act and the Taft-Hartley Act of unfair labor practices over which the National Board has exclusive jurisdiction does not prevent the States from enforcing their own *policies* in matters not governed by the federal law * * *"
> * * *
> "Indeed, the express disclaimer in Section 8(3) of the National Labor Relations Act of intention to interfere with State law and the permission granted the States by Section 14(b) of the Taft-Hartley Act to carry out *policies* inconsistent with the Taft-Hartley Act itself, would be practically meaningless if so easily avoided.

For these provisions can have application, obviously, only where State and federal power are concurrent; * * *"

Algoma Plywood & Veneer Co. vs. WERB, supra, at pages 314, 315.

In a later case this Court reviewed the *Algoma* case, as follows:

"The Court allowed a State to forbid enforcement of a maintenance-of-membership clause in a contract between employer and union * * * *Since nothing in the Wagner or Taft-Hartley Acts sanctioned or forbade these clauses, they were left to regulation by the State.*"

Weber vs. Anheuser-Busch, 348 U. S. 468, 99 L. Ed. (Advance page 386, at page 392). (1955).

Here, the Union's demand that the Employer execute a contract requiring union membership as a condition of continued employment was neither protected nor forbidden by the Act and was subject to regulation by the State of Ohio.

CONCLUSION.

For the reasons stated above, Employer prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Common Pleas of Cuyahoga County, Ohio.

March 19, 1953.

A. V. BAUMANN, *J.*:

Plaintiff is a corporation engaged in the processing of poultry and its sale through company operated retail stores. In the Cleveland area it has seven such outlets with a total of twenty-four employees. Five of the outlets are percentage concessions in Kresge's stores. The defendants are representatives of the local union whose membership includes a very substantial number of the persons employed in the industry. None of plaintiff's employees are or have been members of the union.

The union began active efforts to organize the plaintiff's business about January 1st, 1952. No effort was made to solicit the employees directly. Instead the union sought to meet with the company officials. They received little encouragement, but finally on March 26th, 1952, the company sales manager and local store manager kept an appointment at the union office. There they conferred with the international representative assigned to the defendant local. They were told of the union's interest in organizing plaintiff's operation. The union proposed to negotiate a contract with the company along the lines then prevalent in the industry. The union suggested that this negotiation should be completed and precede solicitation of members because new members often insisted upon impractical benefits and negotiation after organization might be accompanied by excessive friction. The further suggestion was made that if, as and when the terms of the contract were fixed, the employees should be advised of the accomplished fact and afforded the opportunity to join.

A form of contract was displayed providing for compulsory union membership. Apparently the intention of the company's representative was to listen. They stated nothing more important than that final decision must rest with the home office at Lebanon, Pennsylvania, and requested that a proposed contract be forwarded to that office.

The union wrote the company and by the terms of the letter a proposed contract was transmitted. The company denies the receipt of the enclosure. This letter was neither acknowledged nor answered. What on the surface would appear to be a lack of courtesy is in complete accord with the deliberately conceived company policy. Their persistent inertia negatives any claim that they were endeavoring to influence their employees as to the desirability of union membership. No one for the company ever communicated with the union. No one for the company even intimated a course of action for any employee. They maintained unbroken silence.

The union continued its original course of action. They abstained from any employee contact. From time to time the company was urged to participate in another meeting. Other than this no action was taken until February 6th, 1953, when picketing and bannering were begun at one or two of the company's outlets. The company failed to react. On February 10th defendants visited the manager of Kresge's largest Cleveland store in which plaintiff had a concession outlet. They told the manager that they hoped to avoid picketing his store, but that unless the plaintiff met with them it probably could not be avoided. When no change in the company attitude resulted, picketing was extended on February 14th to include a total of five of the seven retail outlets. It has continued since that time. There has been no violence and

only minor deviation from idyllic conduct. The bannering is truthful and the picketing must be conceded to be lawful in manner.

On February 10th the company called a meeting of its employees at the Hotel Carter. It expressly disclaimed any desire or intention to influence the employees, but as a result of the meeting individual employee's contracts for renewable three months periods were presented and signed individually by each employee present. Within a week all twenty-four of plaintiff's employees had signed such a contract. These were in the form of those considered in the *Crosby* case *infra*, and obviously intended to bring this controversy within the purview of that case.

The union questions the jurisdiction of this Court over the subject matter. We have been afforded the opportunity to read the recent opinion of Judge McNamee of the United States District Court in the *Richman Bros.* case. We adopt his well reasoned conclusion as authority for state court jurisdiction,—*Richman Bros. v. Amalgamated Clothing Workers*, No. 29671.

The important question in this case is whether or not the action taken by the union is for an unlawful purpose and contrary to the public policy of the State of Ohio. This public policy may be announced either by the Constitution, the Legislature or the courts of the state. In Ohio there is an absence of Constitutional and statutory declaration.

The leading case in Ohio is that of *Crosby v. Rath*, 136 O. S. 352. This decision has not been modified, distinguished nor overruled by the Supreme Court since its pronouncement in 1939. Because of its importance we have read the briefs and some of the record. The issue in that case was clearly stated on page 3 of the brief of

the American Federation of Labor appearing as *amicus curiae*:

> "May the defendant advise the public that she does not employ union help?"

In the *Crosby* case there was no dispute between the plaintiff and her employees. There is no such dispute here. In the *Crosby* case the purpose was to compel the employer to use union labor. That is the purpose here, but in this case the union goes further and insists that the employer indulge in conduct that will induce the present employees to affiliate with the plaintiff union.

In the *Crosby* case the court approves the following quotation from an Indiana opinion:

> "The right to contract, the right to do business, and the right to labor freely and without restraint are all constitutional rights equally sacred, and the privilege of free speech cannot be used to the exclusion of other constitutional rights."

The Supreme Court of this state in this case decided that an employer has no right to use the weight of his economic relationship with his employee to coerce or induce that man to abstain from membership in any particular union nor to coerce or induce him to join a union or select any particular bargaining agent. A transgression of this rule of conduct is therefore unlawful.

As a trial court, a court of first impression, we are bound to follow the decisions of our court of last resort. The obvious effort of the plaintiff union here is to attain the active co-operation of the employer in its effort to organize his business. The picketing and bannering, lawful in manner, are unlawful in purpose.

The Supreme Court of the United States denied a writ of certiorari in the *Crosby* case, and on the same day

decided the case of the *American Federation of Labor vs. Swing*, 312 U. S. 321, 85 L. Ed. 855.

Some of the trial courts in Ohio took the view that the *Swing* case overruled in effect the authority of the *Crosby* case, and from 1941 until 1950, there was a period of confused thinking and a variety of conclusions.

On May 8th, 1950, much of this confusion was dissipated. Mr. Justice Frankfurter in *Local 309 v. Haake*, 339 U. S., 460, 94 L. Ed. 985, made the following contribution:

> "We must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equaled with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is 'indeed a hybrid.' * * * The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and the power of the states to set the limits of permissible contest open to industrial combatants. * * * A state's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing, as such a judgment does, however, a state's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment comes to this court bearing a weighty title of respect."

In that case the court held that the Fourteenth Amendment did not prevent a state court from use of the injunction to prohibit the picketing of a business conducted by the owner himself to compel him to comply with a demand to become a union shop.

Proceeding, Mr. Justice Frankfurter said:

> "Whether to prefer the union or a self-employer in such a situation, or to seek partial recognition of both interests, and, if so, by what means to secure such

accommodation, obviously present to a state serious problems. There are no sure answers, and the best available solution is likely to be experimental and tentative and always subject to the control of the popular will. That the solution of these perplexities is a challenge to wisdom and not a command of the Constitution, is the significance of Senn v. Tile Layers, 301 U. S., 468, 81 L. Ed. 1229."

In *Building Service Union v. Gazzam,* 338 U. S., 903, 94 L. Ed., decided the same day, the court had under consideration a statute of the State of Washington which protected the worker from interference, restraint or coercion by an employer in the selection by an employee of his union or bargaining agent. The picketing was peaceful. The court held that:

"Picketing of an employer to compel him to coerce his employee's choice of a bargaining representative is an attempt to induce a transgression of the public policy of the State of Washington, and an injunction to restrain such picketing is not an unwarranted encroachment upon rights protected by the Fourteenth Amendment."

In delivering the opinion Mr. Justice Minton said:

"This court has said that picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution. * * * But since picketing is more than speech and establishes a locus in quo that has far more potential for inducing action or non action than any message the pickets convey, this court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity."

These decisions have recently, March 16th, 1953, been reaffirmed in the case of *Local of Journeyman Plumbers v. Graham,* Justice Burton delivering the opinion.

The defendants disclaim any intention to interfere with the employment contracts between the plaintiff and its individual employees. For this reason we predicate our conclusion solely upon the intent of the union to coerce the employer to assist it in its efforts to organize.

An entry may be drawn enjoining the picketing.

A. V. BAUMANN,

Judge.

APPENDIX B.

Opinion of the Court of Appeals of Cuyahoga County, Ohio.

Nov. 16, 1953.

PER CURIAM:

This is an appeal on questions of law from a judgment of the Court of Common Pleas, granting plaintiff a permanent injunction enjoining and restraining the defendants from picketing, bannering or patrolling the streets or sidewalks adjacent to plaintiff's places of business in Cuyahoga County.

Two grounds of error are assigned: (1) that the court lacked jurisdiction; (2) that the court erred in granting the injunction.

The essential facts are not in dispute. It is conceded that the picketing was for organizational purposes, there being no solicitation of plaintiff's employees to become members of the Union. Instead there was tendered to plaintiff a proposed bargaining contract between plaintiff and defendants, by the terms of which plaintiff's employees would be compelled to become members of the local union as a condition of their continued employment.

Upon plaintiff's failure to sign the proposed contract, defendants proceeded to picket and banner.

We have carefully examined the record and have considered the arguments of counsel, both orally and by way of briefs, and have concluded that the judgment should be affirmed for the reasons generally set forth in the opinion of the trial court. The authorities therein cited and quoted are, in our opinion, controlling and decisive of the issues herein involved.

Since the judgment in the instant case (March 19, 1953), the Court of Appeals of the Ninth Appellate District (Summit County), in the case of *Bean vs. Local Union No. 698*, 94 Ohio App. 361 decided July 1, 1953, held in an opinion by Stevens, *J.*, as follows:

> "In the absence of a dispute between employer and employees, or between the union and the employer or employees, a labor union may not engage in organizational picketing, even though peaceful, for the purpose of bringing pressure to bear upon the employer to require his employees to join the union." (syllabus)

There is a very close analogy between *Bean vs. Union* (*supra*) and the instant case. We are of the opinion that the reasoning and authorities therein cited are likewise applicable to the instant case.

Judgment affirmed. Exceptions noted. Order see journal.

HURD, *P.J.*, KOVACHY, *J.*, SKEEL, *J.*, concur.

APPENDIX C.

Opinion of Court of Appeals on Rehearing.

KOVACHY, *J.*:

This is a rehearing of a previous decision of this court.

On November 16, 1953, we affirmed a judgment of the Court of Common Pleas which granted an injunction to plaintiff-appellee, prohibiting defendants-appellants from picketing its places of business in Cuyahoga County. Our decision was based upon the then prevailing policy of the State of Ohio, relating to injunctions in labor disputes. After our decision, the Supreme Court of the United States on December 14, 1953, handed down a sweeping decision in the case of *Garner vs. Teamsters' Union*, 346 U. S. 485, wherein it held that the National Labor Relations Board had exclusive jurisdiction in certain cases involving interstate commerce. Thereafter, and within term, an application for rehearing was filed by defendants-appellants, by reason of the *Garner* decision. It was because of the possible impact of that case upon the instant case that we granted a rehearing, to determine what bearing, if any, it may have on the case here before us on appeal on questions of law.

Plaintiff-appellee, Grimes & Hauer, Inc., is a corporation organized under the laws of Pennsylvania and licensed to transact business in the State of Ohio, and is engaged in interstate commerce processing poultry. It operates seven retail outlets for its products in Cleveland, five of them under concession agreements with the S. S. Kresge Company. Defendants-appellants are Sam Pollock, individually and as International Representative of Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. L. Local Union 427, and the Union itself, Amalgamated Meat Cutters and Butcher Workmen of

North America, A. F. of L. Local Union 427; Daniel J. DeSantis, Individually and as President of Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. of L. Local Union 427; Francis J. Kilbane, individually and as Business Representative of the Union; and Michael L. Koeber, individually and as Business Representative of said Union.

The membership of the Union comprise a substantial number of persons employed in this industry in this locality.

The trial court's conclusion was that the sole intent of the defendants was "to coerce the employer to assist it in its efforts to organize" and that the picketing, though lawful in manner, was unlawful in purpose and therefore, contrary to the public policy of the State as announced by the Supreme Court of Ohio in the case of *Crosby vs. Rath*, 136 Oh. St. 352.

Our decision affirmed the judgment of the trial court, for the reasons generally set out in its opinion as well as on the authority of *Bean vs. Local Union No. 698 etc.*, 94 Oh. App. Rep. 361, the syllabus of which reads:

> "In the absence of a dispute between employer and employees, or between the union and the employer or employees, a labor union may not engage in organizational picketing, even though peaceful, for the purpose of bringing pressure to bear upon the employer to require his employees to join the union."

Defendants picketed plaintiff's places of business for the purpose of coercing the plaintiff employer to get its employees to join their Union through means of a written agreement entered into between plaintiff and defendants, or any other means. The picketing was peaceful and orderly in manner. Part of it amounted to secondary boycott since it included the Kresge stores. Four days after

the commencement of the picketing, the plaintiff for the first time entered into written contracts with its employees for renewable three-month periods.

The controlling facts in the instant case are well nigh identical to those in the *Garner* case. Each employer is engaged in interstate commerce; each has twenty-four employees; none in this case belong to the Union—four employees in the *Garner* case; the pickets were not employees; no controversy, labor dispute or strike was in progress and the employers had not objected to their employees joining the Union; the picketing, moreover, was peaceful and orderly and primarily intended as a form of coercion on the employer to compel and influence its employees to join the Union.

The legal basis for the granting of an injunction by the trial court in each case, however, was dissimilar in that in this case the trial court relied upon the policy with respect of the matter established by the Supreme Court of Ohio, whereas in the *Garner* case, the trial court invoked its own State's Labor Relations Act. The difference between such propositions of law, in our opinion, is one of form rather than of substance, and consequently alike in force and effect. In the practical affairs of life it makes no difference whether the policy of the State is determined by judicial decision or legislative enactment.

Now the Taft-Hartley Act of Congress deals with the same matter. It condemns the kind of conduct engaged in by the Union in each of these cases as unfair labor practice.

Sec. 8(b), 61 Stat. 141, 29 U. S. C. (Supp. III) Sec. 158(b):

> "It shall be an unfair labor practice for a labor organization, or its agents * * * (2) to cause or attempt to cause an employer to discriminate against an em-

ployee in violation of subsection (a), (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *."

61 Stat. 140, 29 U. S. C. (Supp. III) Sec. 158(a):

Subsection (a)(3) reads in part: "It shall be an unfair labor practice for an employer * * * (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

The same act designates a secondary boycott as an unfair labor practice, 29 U. S. C. Sec. 158(b) (4) (A):

"forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person;"

We are unanimously of the opinion, in view of the factual and legal identity of the instant case with that of the *Garner* case, that the ruling of the Supreme Court of the United States in the latter case is applicable to and controlling in this case.

The first paragraph of the syllabus of the *Garner* case reads:

"Petitioners were engaged in Pennsylvania in an interstate trucking business. Only a small minority of its employees were members of respondents' union. No labor dispute or strike was in progress, and petitioners had not objected to their employees joining the union.

> Respondents kept two pickets at petitioners' loading platform, to coerce petitioners into compelling or influencing their employees to join the union. The picketing was peaceful, but petitioners' business fell off 95% because employees of other carriers refused to cross the picket line. *Held:* Petitioners' grievance was within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices under the Labor Management Relations Act and was not subject to relief by injunction in the state courts."

The complaint of the plaintiff, it would seem, is exclusively within the jurisdiction of the National Labor Relations Board and is not subject to relief by injunction in the state courts.

Plaintiff contends that even if the above be true that the defendants picketed to compel plaintiff to violate the provisions of its employment contracts and that the Taft-Hartley Act contains no remedy for inducing Breach of Contracts, whereas the law of the State of Ohio does confer jurisdiction in that regard upon the courts of the State. The trial court in its opinion stated:

> "The defendants disclaim any intention to interfere with the employment contracts between the plaintiff and its individual employees. For this reason we predicate our conclusion solely upon the intent of the union to coerce the employer to assist it in its efforts to organize."

It cannot be denied that the picketing in this case, if it attained its avowed purpose, would lead to the interference of the mentioned contracts, and the subsequent violation of the private rights of the parties involved herein. However, such effect, if it occurred, would be incidental to the violation of the public right recognized in the Taft-Hartley Act, which when enforced obviates the necessity of seeking judicial determination of the private rights.

It follows, therefore, that the National Labor Relations Board has the power alone to act in the matter, and to provide full relief for the wrongs complained of. To hold otherwise would deprive the National Labor Relations Board of the exclusive jurisdiction conferred upon it by Congress in a subject matter clearly within its purview, and prevent it from exercising such jurisdiction freely and fully and completely freed of all restraints from other tribunals. *Capital Service Inc. etc. vs. National Labor Relations Board,* decided by the Supreme Court of the United States, May 17, 1954, 22 L. W. 4241; and the following paragraphs of the syllabus of the *Garner* case:

> "(b) The same considerations which prohibit federal courts from intervening in such cases, except by way of review or on application of the National Labor Relations Board, and which exclude state administrative bodies from assuming control of such matters, preclude state courts from doing so."
>
> "(c) When federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because such procedure will apply some doctrine of private rights."

We accordingly hold that the Court of Common Pleas of Cuyahoga County lacked jurisdiction to hear a case involving violation of federal law, in an industry engaged in interstate commerce and it was therefore error to deny defendants' motion to dismiss for lack of jurisdiction.

Judgment reversed and final judgment for the defendants. Exceptions. Order see journal.

HURD, P.J., SKEEL, J. concur.

APPENDIX D.

Opinion of the Supreme Court of Ohio.

Because of the decision of the Supreme Court of the United States in the case of *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U. S. 485, where a labor union is in dispute with an employer engaged in interstate commerce over the unionization of the employer's nonunion employees, and the union pickets the business locations of such employer in an orderly and peaceful manner, a state court is without jurisdiction to enjoin the picketing; a controversy of this kind comes within the provisions of the Labor Management Relations Act (Section 151 et seq., Title 29, U. S. Code), as it relates to unfair labor practices; and the employer must, initially at least, pursue the remedy of presenting his grievance to the National Labor Relations Board.

(Decided May 25, 1955.)

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY.

This is an action for injunctive and other equitable relief against picketing by a labor union and was instituted in the Court of Common Pleas of Cuyahoga County. Grimes & Hauer, Inc., hereinafter referred to as plaintiff, is a corporation organized and existing under the laws of Pennsylvania but authorized and licensed to do business in Ohio. It is engaged in Pennsylvania in the processing of poultry, which is transported into Ohio in refrigerated conveyances. It maintains seven locations in the city of Cleveland, Ohio, where, with some 25 employees, it sells a part of its products.

Sam Pollock and other individual defendants are agents, officers and representatives of the defendant Amalgamated Meat Cutters & Butcher Workmen of North

America, an unincorporated and voluntary association affiliated with the American Federation of Labor.

Plaintiff's Cleveland employees are not members of a labor union. In January 1952, certain of the defendants made contact with plaintiff's local managers and some of its employees to discuss unionization. Plaintiff's district manager and later its general sales manager entered the negotiations, and defendants proposed a labor agreement between the union and plaintiff relating to the unionization of plaintiff's employees in Cleveland. These negotiations produced no tangible results, so beginning on February 6, 1953, the picketing of plaintiff's business locations in Cleveland began. Such picketing was at all times carried on in a quiet orderly manner.

On February 10, 1953, plaintiff called a meeting of its employees at a Cleveland hotel. This meeting was attended by plaintiff's vice-president and treasurer, general sales manager and district manager, and individual contracts of employment were submitted and were signed by such employees and plaintiff, whereby plaintiff agreed to hire such employees for a three month period at a stipulated weekly wage, and the employees agreed to work in accordance with such terms.

Defendants' pickets carried "sandwich" signs. Those displayed in front of plaintiff's direct retail establishments bore the wording, "This Market Does Not Employ Union Help. Please Do Not Patronize," and those displayed at the entrances to Kresge stores, where plaintiff occupies leased space, read, "Grimes & Hauer Poultry Does Not Employ Union Help."

It was then that plaintiff brought its action in the Court of Common Pleas to enjoin the picketing. The petition alleges that defendants entered into an unlawful combination and conspiracy to injure and destroy plaintiff's

business by coercing plaintiff to compel its employees to become members of the defendant union; and that the picketing is unlawful in that the union does not represent plaintiff's employees and no trade dispute exists between plaintiff and its employees. The petition further describes the employment agreements executed by plaintiff and its employees and alleges that defendants' actions would operate to terminate such agreements. In addition, it is stated that defendants' conduct constitutes a secondary boycott in that its effect is to bring economic pressure upon Kresge to end its business relations with plaintiff. Plaintiff claims irreparable injury and damage for which there is no adequate remedy at law and prays for an order enjoining defendants' picketing activities.

In their answer defendants deny any unlawful actions on their part or that they are engaged in any conspiracy to harm plaintiff's business or to intimidate, coerce or interfere with plaintiff, its employees or its customers. Further defendants deny any conduct having for its purpose the breach of any agreements between plaintiff and its employees or interference with any lease or concession between plaintiff and Kresge.

As a separate defense, the jurisdiction of the Court of Common Pleas over the subject matter of the action is challenged on the ground that a bona fide labor dispute exists between defendants and plaintiff; that the petition on its face discloses a situation exclusively governed by the National Labor Management Relations Act of 1947 (Section 151 et seq., Title 29, U. S. Code); and that the controversy is one solely for the National Labor Relations Board and the federal courts. Such answer was met by reply.

The Court of Common Pleas assumed jurisdiction of the controversy and upon the pleadings and a considerable

amount of evidence entered a decree enjoining defendants from picketing plaintiff's places of business or from interfering with plaintiff, its employees or its customers. The trial court found that the object of defendants' picketing was to coerce plaintiff to assist defendants in their efforts to organize plaintiff's employees and was unlawful in purpose and contrary to the public policy of the state as established by the case of *Crosby vs. Rath* (1940), 136 Ohio St., 352, 25 N. E. (2d), 934, certiorari denied, 312 U. S., 690, 85 L. Ed., 1126, 61 S. Ct., 618.

An appeal on questions of law was taken to the Court of Appeals which at first affirmed the judgment below. However, upon rehearing and reconsideration, the court changed its position on authority of *Garner vs. Teamsters, Chauffeurs & Helpers Local Union No. 776* (1953), 346 U. S., 485, 98 L. Ed., 228, 74 S. Ct., 161, and held that the Court of Common Pleas was without jurisdiction over the subject matter of the controversy. Thereupon the Court of Appeals reversed the judgment below, vacated and dismissed the injunction issued against the defendants and entered final judgment in their favor. The opinion of the Court of Appeals is reported in 119 N. E. (2d), 889.

The cause is now in this court for decision on its merits on an appeal as of right and on the allowance of a motion to require the Court of Appeals to certify its record.

Messrs. Stanley, Smoyer & Schwartz, Mr. Carl H. Clark, and Mr. Edward J. Simerka, for appellant.

Messrs. Smoot & Riemer, for appellees.

ZIMMERMAN, J. Was the Court of Appeals correct in its determination? In answering this question the salient facts to be borne in mind are that plaintiff is a foreign corporation engaged in interstate commerce, that the picketing of plaintiff's places of business by defendants was con-

cededly of a peaceful and orderly nature, that the Constitution of Ohio does not contain any express provision relating to the "right to work," and that the General Assembly of Ohio has enacted no legislation on this subject.

Upon examination of the case of *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, supra* (346 U. S., 485, 98 L. Ed., 228, 74 S. Ct., 161), we can not escape the conclusion that the Supreme Court of the United States, under facts similar to those existing in the instant case, has definitely said that the Labor Management Relations Act applies and that state courts may not intervene.

In that case a labor union peacefully picketed the premises of an interstate trucking company in Pennsylvania. Such picketing had for its purpose the unionization of the company's employees. There was no labor dispute between the company and its employees and the company did not object to its employees becoming union members. At the instance of the employer, a Pennsylvania Court of Common Pleas enjoined the picketing as in violation of the State Labor Relations Act. On appeal the Supreme Court of Pennsylvania (373 Pa., 19, 94 A. (2d), 893), although finding that the object of the picketing was to coerce the employer to have its employees join the union, reversed the judgment of the lower court, on the ground that the situation came within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices, and, therefore, state courts were precluded from assuming jurisdiction.

In its opinion, in affirming the judgment of the Pennsylvania Supreme Court, the Supreme Court of the United States said, in reference to the Labor Management Relations Act:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent

to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."

So far as we can ascertain, the *Garner* case represents the latest pronouncement of the Supreme Court of the United States directly on a set of facts resembling those in the instant case and lays down the rule that a state court does not possess the power to enjoin union conduct, such as the picketing of an interstate employer's premises to induce the unionization of its employees, since such activity presents the question of an unfair labor practice within the meaning of the terms of the Labor Management Relations Act which, initially at least, is exclusive.

Attention is also directed to *Capital Service, Inc., v. National Labor Relations Board* (C. C. A. 9, 1953), 204 F. (2d), 848, affirmed, 347 U. S., 501, 98 L. Ed., 887, 74 S. Ct., 699, where picketing, persuasion exerted on employees and customers and a secondary boycott by a labor union were involved and where it was held that the National Labor Management Relations Act applied to the exclusion of injunctive relief by a state court. And see *Gulf Shipside Storage Corp. vs. Moore* (La., March 21, 1955).

The case of *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, 98 L. Ed., 1025, 74 S. Ct., 833, is cited in support of the proposition that the courts of Ohio have jurisdiction in a case like the one at

bar. However, an examination of the *Laburnum* case shows that it was a tort action, dealt with an entirely different situation from the one presented here and is not controlling in the instant controversy.

In that case the court specifically pointed out that, although the Labor Management Relations Act sets out exclusive procedural remedies for preventing unfair labor practices which prevail over the right of a state court to act, it does not prescribe any remedy for "dealing with the consequences of tortious conduct already committed" and hence the states are still at liberty to provide their own procedure in such cases.

Nor do we think the case of *Milwaukee Boston Store Co. v. American Federation of Hosiery Workers* (Wis., 1955) is in point. There a labor union picketed a store for the purpose of causing the store's customers to refrain from buying a certain brand of hosiery sold by the store because the union was engaged in a dispute with the manufacturers of the hosiery. The *store* brought an action in the state court to enjoin the picketing, in which it was successful. On appeal, the Supreme Court of Wisconsin modified the order of the trial court and, as modified, affirmed the same. The Supreme Court held that there had been no pre-emption by Congress over the type of secondary picketing of neutrals therein enjoined by the trial court in carrying out the policy of the state as expressed in its statutes prohibiting the same. The court then added that it hoped the United States Supreme Court would pass directly on this important question in the not too distant future.

As to the case of *Amalgamated Clothing Workers of America vs. Richman Brothers* (U. S., April 4, 1955), we adopt the comments of counsel for the defendants herein as follows:

> "The precise issue decided by the U. S. Supreme Court in this case was that Section 2283 of the Judicial Code bars federal District Courts from enjoining an employer's prosecution of state court action for injunction against picketing. However, in so holding, the Supreme Court specifically affirmed that its decisions in *Weber vs. Anheuser-Busch, Inc.*, 348 U. S., 593, and *Garner vs. Teamsters Union*, 346 U. S., 485, had disposed of the issue of state courts' power in peaceful, organizational picketing cases saying:
>
> " 'We may assume that the conduct in controversy (peaceful picketing) is subject to whatever relief the Taft-Hartley Act may afford and, therefore is outside state authority.' "

Several reasons are advanced by counsel for plaintiff as to why the *Garner case* is not applicable and as to why the courts of Ohio have jurisdiction over the subject matter of this action.

As has been pointed out, in Ohio there is no constitutional provision relating directly to the "right to work," and the General Assembly of this state has not enacted any legislation on that subject. However, counsel for plaintiff rely on Section 164(b), Title 29, U. S. Code, which reads:

> "Nothing in this act (Section 151 et seq. of this Title) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or territorial law."

By virtue of such subsection it is contended that the decisions of this court, notably, *Crosby v. Rath, supra* (136 Ohio St., 352, 25 N. E. (2d), 934), and *W. E. Anderson Sons Co. v. Local Union No. 311, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America*, 156 Ohio St., 541, 104 N. E. (2d), 22, have established the "right to work" law in Ohio whereby employees working under agreements with their employers may not

be required, against their wish, to become members of a union as a condition to their employment.

In the first place we believe that Section 164(b) has reference to a constitutional provision or a legislative enactment. In the second place, if this is not so, we believe it can not fairly be said that the *Crosby* and *Anderson* cases bring Ohio within the exception contained in Section 164-(b). Those cases hold that picketing was unlawful under the precise facts there in issue, but to go further and say on authority of such cases that the firm policy of Ohio is to prohibit agreements of the kind described in Section 164(b) is hardly tenable.

Counsel for plaintiffs seek also to bring the case within the bounds of state law on the basis that the Labor Management Relations Act and the *Garner case* deal only with public rights, and since private rights are here involved as represented by the contract of employment entered into between plaintiff and its employees, which by their picketing defendants would nullify, Ohio courts may intervene.

In view of the language used in the latter part of the opinion in the *Garner case,* this argument is not persuasive. As we read that opinion, both public and private rights are comprehended in the Labor Management Relations Act.

In the event this controversy should ultimately be taken before the National Labor Relations Board and that agency should decline to entertain the matter, another question might arise with which we have no present concern.

In our opinion, no error is apparent in the judgment of the Court of Appeals, and such judgment is, therefore, affirmed.

Judgment affirmed.

Mathias, Stewart, Bell and Taft, *JJ.*, concur.

Weygandt, *C.J.*, and Hart, *J.*, dissent.

APPENDIX E.

Judgment of the Court of Common Pleas of Cuyahoga County.

March 23rd, 1953: To Court: Official Court Reporter in attendance three days and a fee of $12.00 is ordered taxed as costs. This matter came on to be heard for final order upon plaintiff's petition, the joint answer of the defendants, plaintiff's reply thereto, the evidence of all parties, the argument of counsel, and was submitted to the Court. The Court being fully advised in the premises finds that the plaintiff is entitled to a permanent injunction against the defendants, and each of them.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED, that the defendants, and each of them, the officers and members of Amalgamated Meat Cutters & Butcher Workmen of North America, A. F. of L., Local Union 427, and all persons acting in aid of or in conjunction with them, and all other persons to whom notice of this order shall come, be and they are hereby permanently enjoined and restrained:

1. From picketing, bannering or patrolling the street or sidewalks, public or private, adjacent to or in the vicinity of the places where the plaintiff conducts its business in Cuyahoga County, Ohio, or loitering or congregating at or near any entrance to such places of business and from threatening so to do.

2. From inducing, or attempting to induce, any customer, prospective customer, or any person, firm or corporation with whom plaintiff deals not to deal with plaintiff, and from making, publishing, distributing, or displaying any statement, oral, written, printed, painted or otherwise, or from doing any other act or thing, with the intent, purpose or effect of injuring the plaintiff's business, and from threatening so to do.

3. From in any manner preventing, interfering with, impeding, delaying, or stopping any deliveries to the plaintiff or to plaintiff's lessors, and from threatening so to do.

4. From coercing by any means or attempting to coerce the plaintiff to in turn induce or coerce its employees against their will to become members of the defendant union, or against their will to authorize said union to be their collective bargaining representative.

5. From advising, protecting, aiding, or abetting or assisting any person or persons in the commission of the acts hereby restrained.

And it is further considered that the plaintiff recover of the defendants its costs herein taxed and to be taxed, for which execution is awarded. Defendants except. Bond for Appeal One Hundred Dollars ($100.00). Received for Filing March 23, 1953 Leonard F. Fuerst, Clerk of Courts by A. M. Harrington, Deputy Clerk. (Civil Journal 329, Page 577.)

APPENDIX F.

Judgment of the Court of Appeals of Cuyahoga County.

November 24, 1953: To Court: This cause came on to be heard on the appeal on questions of law from the judgment of the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed, see per curiam opinion, and it is ordered that appellee recover of appellant his costs herein taxed. The Court finds there was reasonable grounds for this appeal. It is ordered that a special mandate issue out of this Court directing the

Common Pleas Court to carry this judment into execution. To all of which appellants by their attorneys except. (Journal 19, page 243.)

APPENDIX G.

Judgment of Court of Appeals on Rehearing.

July 12, 1954: To Court: This cause came on for rehearing within term of a previous decision of this Court and was heard on appeal on questions of law, assignments of error, bill of exceptions, transcript of documents and journal entry in the Court of Common Pleas of Cuyahoga County, Ohio, and briefs, and was argued by counsel and submitted to the court.

Upon reconsideration whereof this Court finds that in the record and proceedings aforesaid there is error manifest upon the face of the record to the prejudice of the appellant in this to wit: That the complaint of the plaintiff-appellee is exclusively within the jurisdiction of the National Labor Relations Board and is not subject to relief by injunction in the state courts; that the National Labor Relations Board has the power alone to act in the matter and to provide full relief for the wrongs complained of; and that the Court of Common Pleas of Cuyahoga County lacks jurisdiction to hear a case involving violations of federal law in an industry engaged in interstate commerce; and, it was therefore error to deny defendants' motion to dismiss for lack of jurisdiction; and enter judgment for appellee and grant a permanent injunction when judgment should have been entered for the appellants and the petition dismissed for lack of jurisdiction, see opinion.

It is therefore considered, ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Cuyahoga County be and the same is hereby reversed, and the Court coming now to render the judgment

which the Court of Common Pleas of Cuyahoga County ought to have rendered, final judgment is now entered in this Court for the appellants, and the injunction heretofore issued against appellants be and the same is hereby vacated, dissolved and held for naught.

It is further ordered that this cause be remanded to the Court of Common Pleas of Cuyahoga County, Ohio to carry this judgment into execution and that the appellants recover from the appellee their costs herein taxed. Ordered that a special mandate be sent to said Common Pleas Court to carry this judgment into execution. To all of which appellee, by its counsel, excepts. (Journal 19, page 441.)

APPENDIX H.

Judgment of the Supreme Court of Ohio.

May 25, 1955.

Appeal from the Court of Appeals of Cuyahoga County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by Counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellant their costs herein expended taxed at $_____.

ORDERED, That a special mandate be sent to the Court of Common Pleas of Cuyahoga County, to carry this Judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry." J. 41—507.

No. 405.

Office - Supreme Court
FILED
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HAROLD B. WILLEY,

In the

Supreme Court of the United States

OCTOBER TERM, 1955.

GRIMES & HAUER, INC.,

Petitioner,

vs.

SAM POLLOCK,
Individually and as International Representative of Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF FOR RESPONDENTS IN OPPOSITION.

MORTIMER RIEMER,
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Counsel for Respondents.

October, 1955.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8947

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the trial court is reported at 51 Ohio Opinions 142, 115 N. E. 2d 59 (App. A of Petition). The opinion of the Court of Appeals, pertinent here, is reported at 54 Ohio Opinions 433, 119 N. E. 2d 889 (App. C of Petition). The opinion of the Ohio Supreme Court is reported at 163 Ohio St. 372, 127 N. E. 2d 203 (App. D of Petition).

JURISDICTION.

The judgment of the Ohio Supreme Court was rendered May 25, 1955. Application for rehearing was denied June 29, 1955. The petition for a Writ of Certiorari was

filed on September 17, 1955. Respondents' request for an extension of time to file its brief in opposition was granted and time extended to November 15, 1955 by the Clerk of this Court. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

QUESTION PRESENTED.

Whether the national Labor Management Relations Act deprives a state court of jurisdiction to restrain peaceful picketing by a union of an employer engaged in interstate commerce and which conduct is in violation of the Act and whether its jurisdiction has been pre-empted by authority vested by the Congress in the National Labor Relations Board.

STATUTE INVOLVED.

The pertinent provisions of the Labor Management Relations Act, 1947, as amended, 61 Stat. 136 (29 U. S. C. 151 *et seq.*), are set forth in the Appendix hereto at pages 19 to 21.

STATEMENT OF THE CASE.

The Supreme Court of Ohio affirmed the decision of its Court of Appeals and found, in reliance upon *Garner v. Teamsters Union*, 346 U. S. 485, that the state court was without jurisdiction to enjoin respondents' peaceful picketing since the controversy in issue came within the provisions of the Act.

The subsidiary facts upon which the court below based its findings and conclusions are herein set forth.

The Respondent Local Union, herein called the Union, is affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL. The individual re-

spondents are officers and agents of the Union which has about 4,000 members in the Cleveland area employed under collective bargaining contracts with their employers (R. 105).

Petitioner, herein called the company, a Pennsylvania corporation, operates two retail stores, five leased concessions and a warehouse in Cleveland for the sale of cut-up poultry which it receives from its processing plants in Pennsylvania. The leased concessions are in the stores of the S. S. Kresge Co. (R. 55, 56).

In January 1952, representatives of the Union attempted to organize the company's employees and were referred to the district manager (R. 79, 103, 145, 152). In March 1952, union representative Pollock met company officials in Cleveland and outlined the advantages of a union contract suggesting methods of organization for the employees (R. 106, 127, 128). None of the employees were members of the Union. Jennings, the district manager, was concerned about problems which might arise if employees refused to join the Union (R. 27). Pollock explained that he would talk to those employees and they did not have to join the Union (R. 42, 43). Pollock showed Jennings two labor agreements then in effect in Cleveland and Jennings asked for a copy (R. 111). One was mailed to Jennings later that day which contained a standard union-shop provision requiring employee membership in the Union on the thirtieth day following the effective date of the agreement. Employees hired thereafter were required to become members "on and after the thirtieth (30th) day following the beginning of their employment" (Deft's. Exh. B; R. 177).

Nothing further occurred between the parties until December 1952, when Pollock wrote Jennings requesting another meeting (Pltf's. Exh. 1; R. 172). Jennings did not

reply to this letter and ignored requests to communicate or meet with Pollock (R. 147, 153). The Union then decided to picket the company's operations and picketing of one store commenced on February 6, 1953; the next day it was extended to a concession in one Kresge store; on February 14, to two other leased concessions; and, on February 21, to the company's second store (R. 112, 113). The picketing was peaceful at all times and no incidents arose. The trial court noted: "There has been no violence and only minor deviation from idyllic conduct. The bannering is truthful and the picketing must be conceded to be lawful in manner" (App. A of Petition, pp. 2a, 3a).

On February 10, 1952, Pollock visited the Kresge manager and explained the Union's dispute with the company. He stated that he had hoped that a meeting could be arranged with the company in order to obviate any further picketing and to minimize interference with the Kresge operations. The Kresge manager replied that he would just as soon remove the company's concession because he could put the space that it occupied to better use (R. 115). Pollock said that he did not want Kresge to break its lease because he was not "in business to organize anybody out of business"; his object was to improve working conditions and closing stores did not increase union membership (R. 115).

On February 10 and, four days after the picketing started, at a time when only one of the stores and one of the leased concessions were being picketed, and for the first time in the company's relations with its employees, it called them to a meeting in a downtown Cleveland hotel. There they were addressed by the company's vice-president and treasurer and offered individual written contracts of employment under the terms of which the company agreed to employ and the employees to work for a period

of three months at a fixed weekly wage or hourly rate of pay (Pltf's. Exh. 2; R. 33, 173, 174, 175). Picketing continued until enjoined by the trial court.

Based upon these facts, the company filed its petition in the Court of Common Pleas, alleging in part that the Union had entered into an unlawful combination and conspiracy to injure and destroy the company's business for the purpose of coercing the employer to in turn compel its employees to become members of the Union. It alleged that the picketing was unlawful because the Union did not represent a majority of the employees and it was nevertheless demanding that the employer enter into a contract which would require membership in the Union as a condition of continued employment or in the alternative force discharge of employees (R. 4, 7).

The employer alleged further that there was no "legitimate trade dispute" between it and the Union; that it had entered into written contracts of employment with individual employees and the Union's conduct would have the effect of terminating these private contracts which the employer had obtained (R. 7); the Union threatened to stop all deliveries of merchandise to Kresge's (R. 5) and this conduct constituted a secondary boycott, the purpose of which was to bring economic pressure upon Kresge to coerce it to terminate its lease with the company. It prayed for an injunction.

The Federal question involved was first raised by answer which denied the commission of any unlawful acts and pleaded that the Court of Common Pleas lacked jurisdiction over the subject matter of the controversy because it involved a labor dispute between the parties and the petition alleged conduct which constituted violations of Federal law, exclusive jurisdiction over which was lodged

in the National Labor Relations Board under the Act (R. 15).

By reply it was alleged that the Union's demand for a union-shop provision would force the breach of the private contracts of employment that the company had procured and that the mere presence of pickets for the purpose of forcing the employer to coerce employees into the Union was unlawful (R. 17, 18). The reply stated that the employer had not alleged violations of the Act, nor had it sought relief from the Board, but if the facts alleged constituted violations of the Act that would not divest Ohio of jurisdiction because of the violation of Ohio common law which flowed from the acts of respondents (R. 19).

JUDGMENTS OF THE COURTS BELOW.

The trial court granted an injunction (App. A of Petition, p. 3a). The Ohio Court of Appeals first affirmed (App. B of Petition, p. 7a) but on rehearing, following decision of this Court in *Garner v. Teamsters Union*, 346 U. S. 485, unanimously reversed on the latter authority (App. C of Petition, p. 9a). It is this latter judgment, from which petitioner appealed, which was affirmed by the Ohio Supreme Court in a holding that the State court was without jurisdiction to enjoin the picketing since the controversy came within the provisions of the Act, as it relates to unfair labor practices, and the petitioner must initially at least pursue its remedy before the Board (App. D of Petition, p. 15a).

ARGUMENT.

The judgment of Ohio which "comes to this Court bearing a weighty title of respect" (*International Brotherhood of Teamsters, etc. v. Hanke*, 339 U. S. 470, 475), has deprived petitioner of an injunction. The judgment was based upon a proper recognition of this Court's decisions in *Garner v. Teamsters Union*, 346 U. S. 485; *Capital Service, Inc. v. Labor Board*, 347 U. S. 501 and *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468.

The issue in the present case is no longer significant or doubtful as a matter of law. A federal question has been decided in accord with applicable decisions of this Court. Petitioner argues, however, that since it did not seek the intervention of the Board but charged a violation of Ohio law, it should not be deprived of its injunction because of the Board's exclusive jurisdiction to provide a remedy for the same conduct. The Ohio Supreme Court did not agree, obviously, believing that the controversy came within provisions of the Act "as it relates to unfair labor practices" and that decision was controlled by the *Garner* case and others it cited (App. D of Petition, p. 15a).

The Union engaged in peaceful picketing of the petitioner's stores and leased concessions although it did not number any of petitioner's employees as members. The Union's objective through peaceful methods was organization of employees and a signed contract. After four days of picketing by the Union individual written contracts of employment were entered into for the first time between the company and its employees. Then the petition was filed in Common Pleas Court alleging conduct which in more than one particular constitutes a violation of the Act.

The trial court held that the Union's objective was unlawful since it sought through a show of force to coerce

the company to compel its employees to join the Union or risk discharge for refusal to do so (App. A of Petition, p. 4a). The Court of Appeals at first affirmed without passing directly on the Federal question which had been raised. Subsequent to this Court's decision in *Garner*, reargument was had and the Court reversed in a unanimous opinion holding that:

> "* * *, in view of the factual and legal identity of the instant case with that of the *Garner* case, that the ruling of the Supreme Court of the United States in the latter case is applicable to and controlling in this case" (App. C of Petition, p. 12a).

The Supreme Court of Ohio affirmed the Court of Appeals (App. D of Petition). On these facts the decision of the Supreme Court was manifestly correct. There is no conflict of decision but on the contrary Ohio has given full faith to the controlling decisions of this Court. No important or novel question of Federal law is raised by the petitioner requiring decision of this Court.

I.

THE DECISION BELOW IS CORRECT.

Petitioner claims the lower court was in error for refusing to adopt the rule that in cases of peaceful picketing of interstate employers, state courts have the primary duty and responsibility to determine questions of jurisdiction and apply a state remedy for conduct which is a violation of the Act. In effect petitioner argues that it is entitled to a state court injunction and respondents have no right to deprive petitioner of its injunction because it did not allege a violation of the Act or seek the intervention of the National Labor Relations Board.

In reaching decision here the Court below was correct in applying and following *Garner*. Upon examination

it found the facts "similar" and the principle in legal theory the same. Petitioner's attempt to show factual distinction is not persuasive. In *Garner* the conduct violated a Pennsylvania statute. In the instant case petitioner claimed the Union violated the Ohio Constitution, Ohio statutes, breached private rights of employment and was contrary to Ohio decisional law (R. 3, 4, 7). The trial court found that the Union attempted "to coerce the employer to assist it in its efforts to organize" (Petition, p. 7a). Picketing to compel an employer to sign a contract containing an illegal union-security clause is engaging in an attempt to cause an employer to discriminate against employees in violation of Section 8(a)(3) and thereby in violation of Section 8(b)(2). *Amalgamated Meat Cutters and Butcher Workmen*, 81 NLRB 1052, 1055, 1059. The interference with contracts of employees constituted a violation of Section 8(b)(2) of the Act, 29 U. S. C. 158(b), because the Union without complying with statutory authorization procedures was picketing to compel union membership or else force discharge of employees. *International Union, United Mine Workers of America*, 83 NLRB 916, 917, 920. The Court of Appeals felt continued picketing would interfere with these contracts (Petition, p. 13a).

Whether the Union would have been found by the Board to have violated Section 8(b)(4) by its conduct is a question upon which we need not surmise. Initially at least the employer claimed a secondary boycott was engaged in and that deliveries to Kresge would be stopped (R. 5, 8). Such result would follow from the action of neutral employees and if induced by the Union would come "within the provisions of the Act." Thus it is clear that the conduct of respondents was in effect at one and the

same time contributing to a violation of both public and asserted private rights.

In *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, the respondent alleged that the Union's conduct, as here, constituted a secondary boycott under the common law of Missouri, as well as an illegal conspiracy under the common law and state statutes. Yet this Court took occasion to reiterate its rule of the *Garner* case pointing out "that exclusive primary jurisdiction to pass on the union's picketing is delegated by the Taft-Hartley Act to the National Labor Relations Board," 348 U. S. 468, 475. This Court said further that the Board had the responsibility to determine in the first instance which particular section of the Act was violated and that it was not within the competence of this Court "now to determine whether the conduct in controversy is subject to the authority of Subsections (A) or (B)." *Ibid*, p. 478.

Garner cannot be distinguished as petitioner now attempts, and as the respondent sought to do in the *Weber* case, on the ground that the controversy involved conduct prohibited for reasons other than those dealing with labor relations and that private rights had to be dealt with on an exclusive state basis. This Court has said such a distinction is not decisive:

> "* * * if the conduct is eventually found by the National Labor Relations Board to be *protected* by the Taft-Hartley Act, the State cannot be heard to say that it is enjoining that conduct for reasons other than those having to do with labor relations. * * * Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 480.

That is what the lower court meant when in its judgment it held that "initially at least," petitioner must apply to the National Labor Relations Board, for "both public and private rights are comprehended in the Labor Management Relations Act" (App. D of Petition, p. 23a).

The argument made in petitioner's Point Three that no relief could be obtained from the Board and hence it was futile to apply, which thus gave Ohio jurisdiction, is to substitute the State's judgment for the Board's jurisdiction, where the duty of primary decision lies. This is a belated argument in the absence of any attempt to invoke the jurisdiction of the Board to prevent the alleged encroachment upon petitioner's rights. See, *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933. Moreover, petitioner argued below that one reason for not invoking the jurisdiction of the National Labor Relations Board was the time consuming delay of its process and the uncertainty of result, preferring instead the more expeditious injunctive process of the State courts.

The clearest evidence of the correctness of decision and result reached below is seen in this Court's *per curiam* reversal of a judgment of the Kentucky Court of Appeals in *General Drivers, etc., v. American Tobacco Co.*, 348 U. S. 978.

The claimed basis for relief in the *General Drivers* case was not an unfair labor practice but a violation of Kentucky's common law, Constitution, and in particular a state public policy that common carriers and their employees must serve all members of the public without discrimination (264 S. W. 2d 250, 253). Yet under these circumstances this Court in reversing the Kentucky Court of Appeals ruled that state law did not furnish a basis for an injunction ordering employees of a common carrier to cross a picket line set up by a striking union at the plant

of the struck employer. The decision referring to the *Weber* case sustained the exclusive jurisdiction of the Board over conduct which, in addition to coming within the scope of the Act, likewise constituted a violation of state law.

The clear and positive answer to petitioner's arguments under Points One, Two and Three of the Petition was announced with finality in the *Garner, Capital Service, Weber* and *General Drivers* cases. The Ohio Supreme Court followed and applied law of those cases to the similar facts of the instant case and in doing so it was clearly correct.

II.

THERE IS NO CONFLICT OF DECISION.

Petitioner cannot show conflict of decision with cases which control.

Without directly charging conflict, petitioner however in Point Four urges that Ohio has decided three factual situations "not in accordance with applicable decisions of this Court" (Petition, p. 25). Petitioner claims that its right to enjoy the fruits of its private contracts of employment with its employees was jeopardized by the conduct of the Union and for which the lower court provided no remedy. Petitioner asserts the result reached conflicts with this Court's decision in *Garner* because in that case there existed a conflict of remedies as between the Federal and State statutes. Petitioner contends the Act has no remedy for breach of a private contract and hence the lower court in depriving petitioner of its injunction is in conflict with *Garner*. Submission by petitioner to the compulsion allegedly arising from the conduct of the Union would have been an unfair labor practice on the part of both employer and Union in the absence of com-

pliance with statutory authorization procedures. 29 U. S. C. 158(a)(3) and (b)(2). The Union's picketing to force achievement of an illegal contract would be a violation of Section 8(b)(2). *American Radio Association*, 82 NLRB 1344, 1345. The remedy of the Act exercised by the Board was ample to stop such coercion and prevent a violation by both employer and Union and thus guarantee enjoyment of private contractual rights.

The secondary boycott flowed in part from an alleged cessation of deliveries to Kresge presumably from pressure brought to bear upon employees of neutral employers. This was alleged to be in violation of Ohio statutes (R. 4; Page's Ohio Revised Code 1331.01). The conduct in *Weber* was likewise alleged to constitute a secondary boycott under the common law of the State of Missouri. The responsibility to decide whether such conduct does or does not constitute a violation of Section 8(b)(4) of the Act or any other particular section or provision was in the Board not the State court. Even if the conduct asserted as a secondary boycott does not fall within the prohibitions of Section 8 of the Act, it may nevertheless fall within the protection of Section 7 as concerted activity for the purpose of mutual aid or protection and which the State cannot prohibit under the guise of non-labor relations law. *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 478, 479.

The Ohio Supreme Court did not agree that petitioner's constitutional rights had been impaired. The right to engage in business, to labor freely and to contract, were not infringed, but if they were, the argument was not persuasive, since "the conduct in controversy is subject to whatever relief the Taft-Hartley Act may afford, and therefore is outside state authority," *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U. S. 511, 514. Petitioner's argument is similar to that

advanced by the employer in the *Garner* case to the effect that equity courts, which in Ohio enforce the labor relations policy as annunciated by the Constitution, legislature and the courts would enforce rights of a different category, or of a more private nature than the public rights enforced by the National Labor Relations Board. The rights involved in the instant case are no less public, more private in character or constitutionally protected than similar rights involved in the *Garner* and *Weber* cases and where this Court found that the remedy provided by the Act was ample to protect all.

There is no conflict with applicable and controlling decisions of this Court in the lower court's ruling in these three factual situations.

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW INVOLVED.

The judgment of Ohio does not raise a new or important question of Federal law which warrants granting of a Writ of Certiorari.

Every important Federal question involved in the instant case has been previously answered in the *Garner, Weber,* and *General Drivers,* decisions of this Court. However, petitioner attributes to the Ohio Supreme Court an error in construction of Section 14(b) of the Act which it did not make, was not necessary to decision there and presents no federal question to be passed upon here.

There does not exist in Ohio a constitutional provision, statute or public policy limiting authority to enter into union security agreements which is the equivalent of the "State law" referred to in Section 14 (b) of the Act, 29 U. S. C. 164 (b). Petitioner argues however that in *Crosby v. Rath,* 136 Ohio St. 352, the Ohio Supreme

Court established the doctrine that the execution of a labor agreement requiring membership in a union as a condition of employment was unlawful and therefore prohibited. Hence, petitioner says that the "State law" contemplated by Section 14 (b) of the Act was established in Ohio by decision in *Crosby* and picketing in support of a demand for a union shop is prohibited by a right-to-work law arising from decision in the *Crosby* case (Petition, pp. 22a, 23a).

This argument advanced here was answered by the Ohio Supreme Court as follows:

> "In the first place we believe that Section 164 (b) has reference to a constitutional provision or a legislative enactment. In the second place, if this is not so, we believe it can not fairly be said that the *Crosby* [136 Ohio St. 352] and *Anderson* [156 Ohio St. 541] cases bring Ohio within the exception contained in Section 164 (b). Those cases hold that picketing was unlawful under the precise facts there in issue, but to go further and say on authority of such cases that the firm policy of Ohio is to prohibit agreements of the kind described in Section 164 (b) is hardly tenable." (Petition, p. 23a.)*

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* On October 26, 1955, the Ohio Supreme Court decided in the case of *Chucales, et al. v. Royalty, et al.*, that the public policy of Ohio regards peaceful picketing, by non-employees, in the absence of a dispute between the employer and his employees and conducted for the purpose of pressuring the employer to compel his employees to join the union as unlawful. In reaching this result, the court expressly distinguished its previous decision in this case saying:

"* * * As this court recognized in the syllabus of the *Grimes & Hauer* case, the plaintiff therein was entitled to relief under provisions of the Labor Management Relations Act. Therefore the denial to Ohio of the right to enjoin the picketing in the *Grimes & Hauer* case (a denial implied by reason of the doctrine of pre-emption announced in *Garner v. Teamsters,*

(Continued on next page)

Thus, contrary to the assertion made in the Petition it is clear that the Ohio Supreme Court has not decided that Section 14 (b) applies "only to legislative enactments and constitutional provisions of a state" (Petition, p. 28). It concluded rather that it believed that Section 14 (b) contemplates "a constitutional provision or a legislative enactment" as establishing the kind of State law referred to in Section 14 (b). The Ohio Supreme Court does not agree with petitioner's contention that its own decisions in *Crosby v. Rath,* 136 Ohio St. 352, and *Anderson Sons Co. v. Local Union,* 156 Ohio St. 541, the two Ohio cases relied upon by petitioner, established a more restrictive limitation than that imposed by the Taft-Hartley Act upon authority to execute a union-shop agreement. The Ohio Supreme Court does not view its own decisions as so holding or as establishing state policy which petitioner would hold to be the equivalent of a right-to-work statute.

The Ohio Supreme Court has placed in proper perspective its holdings in both the *Crosby* and *Anderson* cases and pointed out that those cases are authority only

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(Continued from preceding page)

Chauffeurs & Helpers Local Union No. 776, 346 U. S., 485, 98 L. Ed., 228, 74 S. Ct., 161) would not, to use the words of Section 164 (b), be 'authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment.'

However, in our opinion, it is not necessary to determine and we do not determine in the instant case whether there is in Ohio, apart from any statutory or constitutional provision therefor, any common-law public policy which in effect establishes a 'right to work' law * * *"

The opinion concluded with this statement: "Since there is no claim that plaintiffs in the instant case were engaged in interstate commerce, the decisions in *Grimes & Hauer, Inc. v. Pollock, supra,* and *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, supra,* are not applicable." 164 Ohio St. 214, advance sheets, No. 34214, Decided October 26, 1955.

for the proposition that picketing was unlawful "under the precise facts there in issue." Petitioner cannot read more into the language and holding of those cases than the Ohio Supreme Court intended.

This is a circuitous effort to raise a Federal question by attempting to burden the Ohio Supreme Court with error for refusing to read into its own decisions state policy equivalent in effect to a right-to-work law. The decision here is not in conflict with *Algoma Plywood & Veneer Co. v. WERB*, 336 U. S. 301, where this Court allowed a state to forbid enforcement of a maintenance-of-membership clause in a labor agreement obtained in violation of a state statute since nothing in either the Wagner or Taft-Hartley Act forbade their regulation by the state. But in Ohio the execution of a contract requiring union membership as a condition of continued employment is not forbidden by Ohio law within the contemplation of Section 14 (b). Ohio decisions do not establish a right-to-work law. The Ohio Supreme Court agreed that this is so. Whether the demand for execution of such an agreement, supported by picketing, in the absence of compliance with statutory authorization provisions constitutes a violation of the Taft-Hartley Act is another question which has been discussed above. This is for the Board to determine. But injection of this argument concerning the construction of Section 14 (b) does not convert the correct decision of the Ohio Supreme Court, following applicable decisions of this Court, into an important question of Federal law that warrants review on certiorari.

CONCLUSION.

The decision below is correct and represents neither a conflict of decisions nor any substantial question warranting review. It is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

The relevant provisions of the Labor Management Relations Act, as amended, 61 Stat. 136 (29 U. S. C. 151, *et seq.*) are as follows:

Rights of Employees.

Sec. 7:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title * * *. (29 U. S. C. Sec. 157.)

Unfair Labor Practices.

Sec. 8 (a):

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this sub-chapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organi-

zation (not established, maintained, or assisted by any action defined in this subsection as an unfair l bor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, * * *. (29 U. S. C. Sec. 158 (a).)

Sec. 8 (b):

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: * * *.

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section * * *.

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of

such employees under the provisions of section 159 of this title: * * *. (29 U. S. C. 158 (b).)

Prevention of Unfair Labor Practices.

Sec. 10 (a):

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith * * *. (29 U. S. C. Sec. 160 (a).)

Limitations.

Sec. 14 (b):

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law. (29 U. S. C. Sec. 164 (b).)

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In the Supreme Court of the United States

No. 405.

OCTOBER TERM, 1955.

GRIMES & HAUER, INC.,
Petitioner,

vs.

SAM POLLOCK,
Individually and as International Representative of Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. L., *et al.*,
Respondents.

PETITIONER'S REPLY BRIEF.

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Respondents.

PETITIONER'S REPLY BRIEF.

The same abbreviations, emphasis, etc., will apply here as described in the Petition for a Writ of Certiorari herein. Reference to the Employer's Petition will be (P.) and to Respondents' Brief (Resp. Bf.).

A STATE COURT'S DECISION ON A FEDERAL QUESTION IS REVIEWABLE JUST AS IS THE DECISION OF A LOWER FEDERAL COURT.

The Union quotes a statement in the opinion of this Court in *Teamsters v. Hanke,* 339 U. S. 470, 475 (Resp. Bf. p. 7) to the effect that here also the judgment of a state court bears a "weighty title of respect." However, the statement in this Court's opinion referred to a judgment of a state court in finding that certain purposes of picketing were contrary to the public policy of that state. The quotation has no application here to a decision by a state court concerning an interpretation of a federal statute.

As to this a state court can lay no claim of a "weighty title of respect."

THE UNION IS IN ERROR IN CLAIMING THAT INITIALLY THE LABOR BOARD HAS JURISDICTION OF THE INSTANT CASE.

The Union incorrectly claims (Resp. Bf. p. 8) that the Employer asserts in its Petition that state courts have jurisdiction to supply a state remedy for conduct which is violative of the Act. On the contrary, the Employer has contended throughout these proceedings that the Union's conduct here was not violative of the Act and that by reason thereof Ohio Courts had jurisdiction to supply a state remedy. Incidentally, the Union also contended until its last brief that its picketing did not violate the Act.

The Union contends (Resp. Bf. p. 10) that the Ohio Supreme Court was correct in holding that "initially" a state court must obtain from the Labor Board a ruling as to the Board's jurisdiction, and cites certain statements contained in the opinion of this Court in *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, at pages 475 and 478. Those statements are clearly inapplicable here.

First. In *Anheuser-Busch* the employer admitted in its petition that the Union's picketing violated Sections 8(b)(4)(A) and (B) of the Act. As quoted in the Petition here (P. 16) this Court there held that a state court has a duty to hear the evidence and determine whether the state court or the Labor Board has jurisdiction. Also that a state court must decline jurisdiction only if "the facts reasonably bring the controversy" within the prohibitions of Section 8 of the Act (348 U. S. 468, 99 L. ed. (Advance page 386 at page 394)).

Second. The Union's quotations from *Anheuser-Busch* (Resp. Bf. p. 10) are inapplicable to the question

here of whether a state court "initially" has jurisdiction to determine whether "the facts reasonably" show the Act to have been violated.

The Supreme Court of Ohio erred in holding that the courts of Ohio had no jurisdiction "initially" to determine their own jurisdiction in the instant case.

THE UNION CANNOT SUSTAIN ITS CLAIM THAT SECTION 8(b)(4) OF THE ACT WAS VIOLATED.

The pleadings and evidence showed that the Union's coercive pressure was aimed at the neutral *employer* Kresge, and not at *employees*. The Union claims that the secondary boycott alleged by Employer was violative of the Act because the Employer alleged that a Union officer *threatened* an officer of *Employer* that Kresge's deliveries would be stopped and because "presumably" a cessation of deliveries to Kresge would result from pressure by the Union "upon employees of neutral employers" (Resp. Bf. p. 13). This claim completely ignores the evidence contained in the record as to this matter.

The record shows the following:

(a) That the Employer alleged in its petition in the Trial Court that the Union's conduct, without specifying any particular conduct, constituted a secondary boycott *under the common law of Ohio* because it was intended to cause Kresge to terminate its business relations with the Employer through fear of damage to itself if it failed to do so (R. 8).

(b) That while picketing one of the Kresge stores, the Respondent Pollock called upon the manager of another Kresge store not theretofore picketed, who stated that he would be inclined to close the Employer's concession in his store if any trouble developed there (R. 99). The Union

then extended its picketing to that store and later the Union officer asked this manager if there had been "any change" (R. 100).

The Court of Appeals, in view of these facts, found that part of the picketing "amounted to secondary boycott" under Ohio law (P. App. C, p. 10a).

The Union claims in its statement of the case that the Respondent Pollock told the Kresge manager that he did not want Kresge to break its lease with the Employer (Resp. Bf. p. 4). The record fails to substantiate this claim. The Kresge manager testified at length as to his conversation with Pollock and stated that he did not recall that Pollock had made any such reply (R. 99, 101).

The allegation relied upon by the Union refers to a *threat* made to the Employer to interfere with Kresge deliveries. Obviously such a threat would not have violated Section 8(b)(4) of the Act, as the Union claims. Section 8(b)(4) prohibits inducing or encouraging *employees* to engage in work stoppage or refusal to perform services. There were no such facts here.

Therefore, the "facts" did not "reasonably bring the controversy within" Section 8(b)(4) of the Act and Ohio courts had jurisdiction to enjoin that secondary boycott.

THE UNION CANNOT SUSTAIN ITS PRESENT CLAIM THAT SECTION 8(b)(2) OF THE ACT WAS VIOLATED BY ITS PICKETING.

For the first time the Union's brief in this regard contends as follows:

(1) That its interference with the performance of Employer's individual contracts of employment with its employees violated Section 8(b)(2) (Resp. Bf. p. 9);

(2) That picketing to compel an employer to sign a contract containing an "illegal" union security clause violates Section 8(b)(2) (Resp. Bf. p. 9);

(3) That if the Employer here had submitted to the Union's compulsion; had executed the contract demanded and had discharged any of its employees who refused to join the Union, then the Employer would have violated Section 8(a)(3) and the Union would have violated Section 8(b)(2) of the Act. The Employer then would have had a remedy before the Labor Board. (Resp. Bf. p. 12.)

(1) The Interference With Individual Contracts of Employment.

For the first time in this proceeding, the Union admits that its conduct interfered with the performance of the Employer's individual contracts of employment with its employees. And the Union now claims that its interference violated Section 8(b)(2) of the Act in that it was picketing to compel union membership or else force the discharge of employees "without complying with statutory authorization procedures." (Resp. Bf. p. 9.)

However, the Union's Answer alleged that

> "the conduct of the defendants * * * *is not* in conflict with or in *violation of the laws* or public policy *of the* * * * *United States.*" (R. 15-16.)

Until now the Union has claimed that its conduct did not interfere with the Employer's contracts or violate any provision of the Act. Obviously interference with contracts is not prohibited by Section 8(b)(2) of the Act. The Union's present claim as to its unlawful purpose is discussed below.

(2) The Union's Claim That Its Picketing Violated Section 8(b)(2) of the Act.

The Union completely ignores the decision of the Labor Board in United Mine Workers (M. F. Fetterolf Coal Company), 103 NLRB 1572 (1953), *which was cited in the Employer's Petition, and which is on all fours here.*

There, as here, the union picketed after the employers had refused union demands that they sign an agreement requiring union membership as a condition of employment (*supra*, at pages 1595, 1600, 1611). There, as here, the union did not represent a majority of the employees of the employers. There, as here, there had been only one meeting between the employers and the union officers (at page 1595) and there, as here, there had been no collective bargaining between the union and the employers.

There the Labor Board found this evidence to be

> "wholly inadequate to warrant a finding that * * *" (the union) "thereby engaged in any violation of Section 8(b)(2) of the Act."
>
> (103 NLRB 1572 at page 1612.)

This decision constitutes an unreversed precedent. It follows that the Union's picketing here did not violate Section 8(b)(2) and that Ohio courts had jurisdiction of the instant case.

Without mentioning this precedent, the Union cites an earlier case, namely, *Amalgamated Meat Cutters & Butcher Workmen,* 81 NLRB 1052 (1949). However, as pointed out in Employer's Petition herein (P. p. 20) the Union there, unlike here, demanded that the Employer execute a contract containing closed-shop provisions, i.e., one which would not have granted employees 30 days in which to join the Union, as required by the Act. The Union also relies on *International Union, United Mine*

Workers of America, 83 NLRB 916 (1949). However, that decision involved a refusal to comply with election procedures (since repealed) which were then required as a condition precedent to execution of a Union-Shop contract. *American Radio Association*, 82 NLRB 1344 (1949), also relied upon by the Union, is another case in which the union demanded employment conditions which would not, unlike the Union's demand here, have granted employees 30 days in which to join the union.

The above cases relied upon by the Union were all decided four years *prior* to the decision in *United Mine Workers* (M. F. Fetterolf Coal Co.), *supra*. Further, in each of the three cases the union-security provisions demanded of the employer were illegal under any circumstances.

Further, the "statutory authorization procedures" referred to by the Union (Resp. Bf. pp. 12-13), namely, the requirement of a union-shop authorization election, is inapplicable here, having been repealed in 1951 (65 Stat. 601).

(3) The Union Suggests a Method Which Would Necessarily Require an Employer to Violate the Act in Order to Vest Labor Board Jurisdiction.

The Union suggests that "Submission by petitioner to the compulsion allegedly arising from the conduct" (of the picketing) "would have been an unfair labor practice on the part of both employer and Union * * *" (Resp. Bf. p. 12). Thus the Union suggests that the Employer should have executed the agreement here demanded by it and, in violation of the individual contracts, should have discharged those employees who refused to join the Union; thus, the Union suggests, both the Employer and the Union

would have violated the Act and thereby have vested jurisdiction in the Labor Board. Obviously the only method of carrying out the Union's suggestion would require employers engaged in interstate commerce to violate the Act in order to obtain a remedy by the Labor Board. Comment seems unnecessary.

Obviously as there was here no "Submission by petitioner to" (the Union's) "compulsion," there resulted no violation of Section 8(b)(2).

THE UNION IS IN ERROR IN CLAIMING THAT THE EMPLOYER HAD A REMEDY BY THE LABOR BOARD FOR THE PROTECTION OF ITS PRIVATE RIGHTS.

The Union states "The Ohio Supreme Court did not agree that petitioner's constitutional rights had been impaired * * *" (Resp. Bf. p. 13). There was no ruling on that question, the Ohio Supreme Court being content to find only that employers engaged in interstate commerce must "initially" ascertain from the Labor Board whether it had jurisdiction (P. App. D, p. 15a).

The Union claims, but without showing any similarities, that the private rights involved here are the same as those involved in *Garner* and *Anheuser-Busch* (Resp. Bf. p. 14). This contention cannot be sustained.

First. In neither *Garner* nor *Anheuser-Busch* did an employer have private rights growing out of individual contracts of employment with its employees.

Second. In both *Garner* and *Anheuser-Busch* the injunctions were granted by reason of the unions' violation of state regulatory statutes, thereby enforcing public rights.

Third. In both *Garner* and *Anheuser-Busch* there was a conflict of remedy, as in each case a state statute and the

Act governed the same conduct. Here the Union's picketing is not violative of the Act, nor is it protected thereby. Therefore, there is no conflict of remedy here.

The Union further claims that even if Employer's private rights have been impaired that the duty of protection of such rights is vested exclusively with the Labor Board (Resp. Bf. p. 13), quoting from this Court's opinion in *Amalgamated Clothing Workers v. Richman Bros.*, 348 U. S. 511, 514. However, the Union omits the phrase "we assume" from the quotation. Obviously an *assumption* in an opinion does not have the effect of a *decision.*

The Union also relies on *Capital Service, Inc. v. N. L.R.B.*, 347 U. S. 501 (1954). There also this Court assumed but did not decide that the picketing was subject to the exclusive jurisdiction of the N.L.R.B.

> "And in Capital Service v. Labor Board * * * this Court granted a limited certiorari which *assumed* that exclusive jurisdiction over the subject matter was in the National Labor Relations Board. * * *"
>
> *Weber v. Anheuser-Busch*, 348 U. S. 468, 99 L. ed. (Advance page 391 (1955)).

Further, no private contract rights, as are involved here, were involved in the *Richman* and *Capital Service* cases.

THE UNION HAS AT NO TIME CLAIMED THAT ITS CONDUCT WAS PROTECTED BY THE ACT.

However, the Union cites *Anheuser-Busch, supra,* (Resp. Bf. p. 10) and argues that the ruling of the Ohio Supreme Court was correct here because a state cannot enjoin conduct found by the Labor Board to be protected by the Act.

As pointed out in Employer's Petition herein (P. p. 3) the Union at no time has claimed that its conduct was

protected by the Act. The Union has not now in its brief claimed its conduct to be protected. Nor does it show such applicability of any section of the Act. On the contrary, the Union now claims its conduct violated Section 8(b) (2) of the Act and that Section 8(b) (4) might possibly have been violated. Obviously the Union's conduct could not have been both specifically permitted (i.e., protected) by the Act and also specifically prohibited (i.e., violative) of the Act. In support the Union cites only *General Drivers v. American Tobacco Co.*, 348 U. S. 978 (1955) and the *Anheuser-Busch* case, *supra*. Both are inapplicable here.

The *American Tobacco* case involved a strike by a union representing a majority of employees. The Kentucky Court's injunction interfered with the conduct of the strike. Further, the union claimed that its conduct was protected by a specific section of the Act. No such situation exists here.

In *Weber v. Anheuser-Busch, supra,* unlike here, there was a strike by a union representing a majority of employees. There the employer claimed that the strike violated the Act. The Missouri Court's injunction interfered with the conduct of the strike. Here there is no claim by the Employer that the Act was violated and no specific claim by the Union that its conduct is protected.

THE CONDUCT OF THE UNION HERE IS UNLAWFUL UNDER STATE POLICY DECLARED BY THE OHIO SUPREME COURT IN 1939 AND AGAIN SINCE ITS DECISION IN THE INSTANT CASE.

The Union argues that there is in Ohio no "public policy" prohibiting execution or enforcement of agreements requiring union membership as a condition of employment "which is the equivalent of the 'State law' referred to in Section 14(b) of the Act." (Resp. Bf. p. 14.)

As shown in Employer's Petition, the decision of the Ohio Supreme Court in *Crosby v. Rath*, 136 Ohio State 352 (1939) established a public policy of Ohio prohibiting the coercion under the same facts as here of employees by their employer to join a union as a condition of their continued employment. There in an opinion "by the court" it was stated:

> "The thing upon which the defendants are insisting is that the plaintiff discharge her employees unless they become members of one of the defendant unions. There is no reason or convincing authority sustaining the contention of the defendants that they have the right to engage in picketing or boycotting under such circumstances." (136 Ohio State 352, at 355.)

While for a time violence was involved in the *Crosby* case, still as to that, the following is stated in an opinion of the Ohio Supreme Court in a case since its decision herein:

> "It is true that the decision in the *Crosby* case might have been based upon the fact that the picketing involved in that case had been accompanied by violence. However, the opinion 'by the court' does not base the decision upon that ground * * *."
>
> *Chucales v. Royalty*, 164 Ohio State 214 at page 222 (October 26, 1955).

IN THE ABOVE RECENT CASE THE POLICY OF THE CROSBY CASE WAS REAFFIRMED BY THE OHIO SUPREME COURT.

Since the decision in the instant case the Ohio Supreme Court decided *Chucales v. Royalty, supra.* Syllabus 2 of that opinion is as follows:

> "The public policy of Ohio, as determined by its courts, regards picketing against an employer as unlawful where there is no dispute between the employer and his employees and where the picketing is conducted by persons who were never employed by that employer and who do not represent anyone who ever was, and *where it is conducted for the purpose of pressuring the employer to compel his employees to join the union of those conducting the picketing.*"

The above facts are precisely the same as in the instant case. Therefore, contrary to the Union's claim, there is in Ohio a public policy making unlawful the Union's picketing here "for the purpose of pressuring the employer to compel his employees to join the union * * *."

THE CROSBY AND CHUCALES DECISIONS SHOW THAT CONTRARY TO THE UNION'S CLAIM, ITS DEMAND HERE UPON THE EMPLOYER WAS UNLAWFUL UNDER OHIO LAW.

The Union claims that a demand as here for execution of a contract requiring union membership as a condition of employment is "not forbidden by Ohio law" (Resp. Bf. p. 17).

The opinion in the instant case, but not the syllabus,[1] contains the following statement:

---

[1] Under Ohio law the syllabus alone states the law of the case. 91 Ohio State 264 (1915); 103 Ohio State 221 (1921); 123 Ohio State 336 (1931).

> "Those cases" (*Crosby* and *Anderson*) "hold that picketing was unlawful under the precise facts there in issue, but to go further and say on authority of such cases that the firm policy of Ohio is to prohibit agreements of the kind described in Section 164(b) is hardly tenable."

As will be hereinafter shown, the remaining six judges of the Ohio Supreme Court, being bound only by their syllabi, are in disagreement with the above statement.

First. In Syllabus 2 of the *Chucales* case (*supra*) the Ohio Supreme Court again, as in the *Crosby* case, holds picketing to be unlawful when for the purpose of compelling an employer to require union membership as a condition of employment.

Second. As to the Union's suggestion that agreements requiring union membership as a condition of employment are lawful in Ohio, the following is stated by the Ohio Supreme Court in its *Chucales* opinion:

> "It is argued that this court in *Grimes & Hauer, Inc. v. Pollock*, 163 Ohio St. 372, 127 N. E. (2d) 203, not only held that the public policy of Ohio does not oppose union shop agreements, but also questioned the reasons it had given for the *Crosby* case decision. There are statements in the opinion, *but not in the syllabus*, which might lend support to such conclusions * * *." (Emphasis by the Court.) (164 Ohio State at 223.)

It will be observed that the member of the Ohio Supreme Court, who wrote the opinion in the instant case, wrote dissenting opinions in both the *Crosby* and the *Chucales* cases.

It seems apparent that there is nothing in the Ohio Supreme Court's opinion in the instant case which holds that a demand for a contract requiring union member-

ship as a condition of employment or picketing for such a purpose is lawful in Ohio.

THE CHUCALES DECISION SHOWS THAT THE OHIO SUPREME COURT ERRED IN ITS CONSTRUCTION AND APPLICATION HERE OF SECTION 14(b) OF THE ACT.

The following statement also appears in the opinion of the Ohio Supreme Court in *Chucales v. Royalty, supra,* construing Section 14(b) of the Federal Act:

> "Those statements" (in *Grimes & Hauer*) "were made in answer to the contention that, because of Section 164(b), Title 29, U. S. Code, and because the common-law public policy of Ohio in effect establishes a 'right to work' law, the state court could enjoin the picketing involved in that case. However, even if there had been a statutory 'right-to-work' law in Ohio, the only effect of Section 164(b), Title 29, U. S. Code, would have been to prevent the National Labor Relations Board from acting in disregard of that law, as, for example, in authorizing execution or application of a union shop agreement. As this court recognized in the syllabus of the *Grimes & Hauer* case, the plaintiff therein was entitled to relief under povisions of the Labor Management Relations Act. Therefore the denial to Ohio of the right to enjoin the picketing in the *Grimes & Hauer* case * * * would not, to use the words of Section 164(b), be 'authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment'." (164 Ohio State 223, 224.)

The above quotation from the *Chucales* case we believe shows error here by the Ohio Supreme Court in construing the Act. It holds that even if there had been an Ohio *statute* protecting the right to work, it would have declined jurisdiction in the instant case. It gave two reasons which seem to be conflicting.

(1) That Section 14(b) is only a limitation upon the jurisdiction of the Labor Board and does not preserve the jurisdiction of state courts, and

(2) That denial here of jurisdiction of Ohio does not violate Section 14(b) because such denial does not authorize the execution or application in Ohio "of agreements requiring membership in a labor organization as a condition of employment."

In reason (1) above, the Ohio Supreme Court failed to follow applicable decisions of this Court in which it was stated:

(a) That Section 14(b) of the Act granted permission to the States "to carry out policies inconsistent with the Taft-Hartley Act." *Algoma Plywood & Veneer Co. v. W.E.R.B.*, 336 U. S. 301 at 314 (1949).

(b) That nothing in the Act sanctioned or forbade contract provisions requiring union membership as a condition of employment and that demands for such provisions "were left to regulation by the state." *Weber v. Anheuser-Busch*, 348 U. S. 468 (1955).

(c) That Section 14(b) granted to the States permission to enforce state law prohibiting picketing for the purpose of requiring union membership as a condition of employment. *Local No. 10 v. Graham*, 345 U. S. 192 (1953).

As to reason (1) it seems, therefore, that instead of Section 14(b) being merely a limitation upon the jurisdiction of the Labor Board, it preserves the jurisdiction of state courts to establish and enforce state policies concerning compulsory union membership.

As to reason (2), the Ohio Supreme Court construed Section 14(b) to be a limitation upon state court jurisdiction instead of a provision protecting it from preemption

by the Labor Board. The Ohio Supreme Court stated in effect that it had not violated Section 14(b) in declining jurisdiction in the instant case. That, we believe, was not an issue as to that Section. The issue was whether in view of Section 14(b) Ohio courts retained jurisdiction to forbid picketing, as here, violative of state policy.

CONCLUSION.

There is now and has been in Ohio for many years "state law" established and now reaffirmed by its court of last resort, declaring picketing to be unlawful when its purpose is the pressuring of an employer, as under the facts here, to execute an agreement requiring union membership as a condition of continued employment. The Union's pressure upon the Kresge stores was a secondary boycott, also unlawful under Ohio common law. The Union's interference with the performance of the employment contracts of the Employer and its employees was also unlawful under Ohio common law.

A remedy was and still is unavailable from the Labor Board under Section 8(b) (2) of the Act (*United Mine Workers,* (M. F. Fetterolf Coal Co.) *supra*) or under Section 8(b)(4). Further, the Act contains no provision to protect the performance of the individual contracts of employment nor a provision forbidding the type of secondary boycott occurring here. Therefore, the facts here did not reasonably show a violation of the Act. (*Weber v. Anheuser-Busch, supra.*) The Union has not claimed and does not now claim that its conduct was protected by the Act. Further, by reason of Section 14(b) of the Act, Ohio courts have jurisdiction of this proceeding.

Therefore, the Ohio Supreme Court erred in holding that inasmuch as the Union's picketing "*relates* to unfair

labor practices" the Employer was required "initially at least" to present its grievance to the Labor Board.

For the reasons stated herein and in its Petition the Employer prays that a writ of certiorari issue to review the judgment of the Ohio Supreme Court in the instant case.

Respectfully submitted,

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